CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 JANUARY 11, 1995 NO. 2

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 122

(T.D. 95–2)

USER FEE AIRPORTS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the establishment of eight additional user fee airports. User fee airports are those which, while not qualifying for designation as an international or landing rights airport, have been approved by the Commissioner of Customs to receive the services of Customs officers for the processing of aircraft entering the U. S. and their passengers and cargo.

EFFECTIVE DATE: December 30, 1994.

FOR FURTHER INFORMATION CONTACT: Peg Fearon, Office of Inspection and Control, 202–927–1413.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 122, Customs Regulations (19 CFR Part 122), sets forth regulations that are applicable to all international air commerce relating to the entry and clearance of aircraft and the transportation of persons and cargo by aircraft.

Under § 1109(b), Federal Aviation Act of 1958, as amended (49 U.S.C. 1509(b)), the Secretary of the Treasury is authorized to designate places in the United States as ports of entry for civil aircraft arriving from any place outside of the United States, and for merchandise carried on the aircraft. These airports are referred to as international airports, and the location and name of each are listed in § 122.13, Customs Regulations (19 CFR 122.13). In accordance with § 122.33, Customs Regulations (19 CFR 122.33), the first landing of every civil aircraft entering the United States from a foreign area must be at one of these international airports, unless the aircraft has been specifically exempted from this requirement or permission to land elsewhere has been granted. Customs officers are assigned to all international airports to accept entries of merchandise, collect duties and enforce the customs laws and regulations.

Other than if making an emergency or forced landing, if a civil aircraft desires to land at an airport not designated by Customs as an

international airport, the pilot may request permission to land at a specific airport and, if granted, Customs assigns personnel to that airport for the aircraft. The airport where the aircraft is permitted to land is called a landing rights airport (19 CFR 122.24).

Section 236 of Pub. L. 98–573 (the Trade and Tariff Act of 1984), codified at 19 United States Code 58b (19 U.S.C. 58b), creates an option for civil aircraft desiring to land at an airport other than an international or landing rights airport. A civil aircraft arriving from a place outside the United States may ask Customs for permission to land at an airport designated by the Secretary of the Treasury as a user fee airport.

Pursuant to 19 U.S.C. 58b, an airport may be designated as a user fee airport if the Secretary of the Treasury determines that the volume of Customs business at the airport is insufficient to justify the availability of Customs services at the airport and the governor of the state in which the airport is located approves the designation. Generally, the type of airport that would seek designation as a user fee airport would be one at which a company, such as an air courier service, has a specialized interest in regularly landing.

Inasmuch as the volume of business anticipated at these airports is insufficient to justify their designation as an international or landing rights airport, the availability of Customs services is not paid for out of the Customs appropriations from the general treasury of the United States. Instead, the services of Customs officers are provided on a fully reimbursable basis to be paid for by the user fee airports on behalf of the recipients of the services.

The fees which are to be charged at user fee airports, according to the statute, shall be paid by each person using the Customs services at the airport and shall be in the amount equal to the expenses incurred by the Secretary of the Treasury in providing Customs services which are rendered to such person at such airport, including the salary and expenses of those employed by the Secretary of the Treasury to provide the Customs services. To implement this provision, generally the airport seeking the designation as a user fee airport or that airport's authority agrees to pay Customs a flat fee annually and the users of the airport are to reimburse that airport/airport authority. The airport/airport authority agrees to set and periodically to review its charges to ensure that they are in accord with the airport's expenses.

Pursuant to Treasury Department Order No. 165, Revised (Treasury Decision 53564), all the rights, privileges, powers and duties vested in the Secretary of the Treasury by the Tariff Act of 1930, as amended, by the navigation laws, or by any other laws administered by Customs, are transferred to the Commissioner of Customs. Accordingly, the authority granted to the Secretary of the Treasury to designate user fee airports and to determine appropriate fees is delegated to the Commissioner of Customs.

Under this authority, Customs has determined that certain conditions must be met before an airport can be designated as a user fee air-

port. At least one full-time Customs officer must be requested, and the airport must be responsible for providing Customs with satisfactory office space, equipment and supplies, at no cost to the Federal Government.

Nineteen airports are currently listed in § 122.15, Customs Regulations, as user fee airports designated by the Commissioner. This document adds eight more airports to the listing of designated user fee airports. These airports and phone numbers at which they can be contacted regarding service are as follows:

Airport	*Contact*
Daytona Beach Regional Airport, Daytona Beach, Florida.	Volusia County Council, (904) 255–8441.
Willow Run Airport, Ypsilanti, Michigan.	Airport Authority, (312) 482–9660.
Sarasota-Bradenton Airport, Sarasota, Florida.	Airport Authority, (813) 359–5200.
Melbourne Regional Airport, Melbourne, Florida.	Director of Aviation, (407) 723–6227.
Tri-City Regional Airport, Blountville, Tennessee.	Airport Commission, (615) 323–6287.
Addison Airport of Texas, Inc., Dallas, Texas.	President, (214) 248–7733.
Pal-Waukee Municipal Airport, Wheeling, Illinois.	Priester Aviation, (708) 537–1200.
Medford-Jackson County Airport, Medford, Oregon.	Airport Director, (503) 776–7222.

Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required for this final rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* do not apply. Agency organization matters such as this amendment are exempt from consideration under Executive Order 12866.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this amendment merely lists those user fee airports designated by the Commissioner of Customs in accordance with 19 U.S.C. 58b and neither imposes any additional burdens on, nor takes away any existing rights or privileges from, the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reasons, pursuant to 5 U.S.C. 553(d)(2), a delayed effective date is not required.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch, Office of Regulations and Rulings, U. S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs Duties and inspection, Freight.

AMENDMENTS TO THE REGULATIONS

Part 122, Customs Regulations (19 CFR Part 122), is amended as set forth below:

PART 122--AIR COMMERCE REGULATIONS

1. The authority citation for Part 122, Customs Regulations, continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644; 49 U.S.C. App. 1509.

2. Section 122.15(b) is amended by revising the list of airports to read as follows:

§ 122.15 User fee airports.

* * * * * * *

(b) *List of user fee airports.*

* * * * * * *

Location	*Name*
Blountville, Tennessee	Tri–City Regional Airport.
Casper, Wyoming	Natrona County International Airport.
Columbus, Ohio	Rickenbacker Airport.
Dallas, Texas	Addison Airport of Texas, Inc.
Daytona Beach, Florida	Daytona Beach Regional Airport.
Fargo, North Dakota	Hector International Airport.
Fort Myers, Florida	Southwest Florida Regional Airport.
Fort Wayne, Indiana	Fort Wayne-Allen County Airport.
Fort Worth, Texas	Alliance Airport.
Klamath Falls, Oregon	Kingsley Field.
Lebanon, New Hampshire	Lebanon Municipal Airport.
Lexington, Kentucky	Bluegrass Airport.
Medford, Oregon	Medford–Jackson County Airport.
Melbourne, Florida	Melbourne Regional Airport.
Midland, Texas	Midland International Airport.
Morristown, New Jersey	Morristown Municipal Airport.
Moses Lake, Washington	Grant County Airport.
Oakland, Michigan	Oakland–Pontiac Airport.
Rockford, Illinois	Greater Rockford Airport.
Sanford, Florida	Sanford Regional Airport.
Sarasota, Florida	Sarasota–Bradenton Airport.
St. Paul, Alaska	St. Paul Airport.
Waukegan, Illinois	Waukegan Regional Airport.
Wheeling, Illinois	Pal–Waukee Municipal Airport.
Wilmington, Ohio	Airbourne Air Park.
Yakima, Washington	Yakima Air Terminal.
Ypsilanti, Michigan	Willow Run Airport.

WILLIAM F. RILEY,
Acting Commissioner of Customs.

Approved: December 13, 1994.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, December 30, 1994 (59 FR 67621)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, December 27, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF PROTECTIVE WRISTBANDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of protective wristbands. Notice of the proposed modification was published November 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 45/46.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after March 13, 1995.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 16, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 45/46, proposing to modify New York Ruling Letter (NYRL) 858816, issued January 3, 1991, by the Area Director of Customs, New York Seaport, wherein a retail package consisting of two knit terry cloth bands, was classified in subheading 6117.80.0010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other made up clothing accessories, knitted or crocheted * * *: Other accessories, Of cotton." No comments were received concerning the matter.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying NYRL 858816. Accordingly, Customs is issuing a ruling letter to reflect proper classification of the merchandise in subheading 9506.99.6080, HTSUS, which provides for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games * * * parts and accessories thereof: Other: Other: Other, Other." The ruling modifying NYRL 858816 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

Dated: December 21, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 21, 1994.

CLA–2 CO:R:C:P 957183 GGD
Category: Classification
Tariff No. 9506.99.6080

MR. BRIAN J. HANSEN
HANSEN SPORTS COMPANY
8305 Westbend Road
Minneapolis, MN 55427

Re: Modification of New York Ruling Letter (NYRL) 858816; protective wristbands; not other made up clothing accessories.

DEAR MR. HANSEN:

In NYRL 858816, Issued January 3, 1991, a retail package consisting of two wristbands, was classified in subheading 6117.80.0010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other made up clothing accessories, knitted or crocheted * * *: Other accessories, Of cotton." We have reviewed that ruling and have found it to be partially in error. Therefore, this ruling modifies NYRL 858816. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter sectIon 625), notice of the proposed modification of NYRL 858816 was published on November 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 45/46.

Facts:

The article at issue is a pair of knit terry cloth bands (80 percent cotton, 10 percent rayon, and 10 percent spandex), one of which contains a protective insert of either rigid plastic or closed-cell foam rubber. The article is imported in a clear plastic package, with a paperboard header that is perforated for hanging display and retail sale. The composition of the inserts, as well as the sizes of the bands and inserts, vary, depending upon the sport for which the wristbands are desIgned. The sample article is intended for use in playing baseball and softball. Marketing information on the header includes the following: "Help avoid wrist injuries and bruises from bad bounces and wild pitches."

Issue:

Whether the retail package containing two wristbands, only one of which contains a protective insert, is classifiable in heading 6117, HTSUS, as other made up clothing accessories, in heading 6307, HTSUS, as other made up textile articles, or in heading 9506, HTSUS, as other sports equipment.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

The essential issue in this case is whether the wristbands are most properly classified as accessories to clothing, as clothing, or as protective sports equipment. Heading 6117, HTSUS, provides for other made up clothing accessories. In Headquarters Ruling Letter (HRL) 088540, issued June 3, 1991, this office discussed the distinction among the headings of the nomenclature covering clothing and accessories (includIng protective clothIng) and protective equipment. We stated that accessories must be related to, or exhibit some connection to a primary article, and must be intended for use solely or princIpally as an accessory. Whether or not the wristbands are found to be clothing, they are not related or connected to a primary article, and are not intended for sole or principal use as a clothing accessory. Thus, the items are not classifiable in heading 6117, HTSUS.

Heading 6307, HTSUS, covers other made up textile articles, including dress patterns. In HRL 951844, issued September 4, 1992, this office classified a pair of cotton/stretch nylon wristbands in heading 6307. We noted that the essential function or the items was to absorb sweat, that they did not constitute clothing accessories, and that there was no specific provision in the Nomenclature for sweatbands. Neither of those wristbands contained a protective insert or functioned to protect the wrist from blows encountered in sports. Since heading 6307 refers to only part of the set, i.e., the wristband without a protective insert, we must look further to properly classify the complete article.

Heading 9506, HTSUS, provides, in pertinent part, for articles and equipment for athletics, other sports or outdoor games. Note 1(e) to chapter 95 states that the chapter does not cover sports clothing. However, the ENs to heading 9506 indicate that the heading covers protective equipment for sports or games, including breast plates, elbow pads, knee pads, cricket pads, and shin guards, all of which provide protection for bones closely underlying the skin and having little natural protection. We find that the wristband containing the protective insert is used in a manner similar to the protective equipment classifiable in heading 9506, and does not comprise sports clothing excluded from chapter 95. Thus, heading 9506 refers to the other part of the set, the wristband containing the protective insert.

Since the components are classifiable in different headings, i.e., 6307 and 9506, the article cannot be classified by reference to GRI 1.

In pertinent part, GRI 2(b) states that:

> [t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

GRI 3(a) directs that the headings are regarded as equally specific when each heading refers to part only of the items contained in a set put up for retail sale. Therefore, to determine under which provision the article will be classified, we look to GRI 3(b), which states in pertinent part that:

> goods * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

In order to determine the essential character of the set, we next view explanatory Note VIII to GRI 3(b), which provides the following guidance:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

We note that a wristband without a protective insert essentially functions to absorb sweat, while the other component primarily provides protection. We are also mindful that in baseball and softball, the wrist that faces the pitcher and wears the fielder's glove is in greater need of protection than the other wrist. Thus, the pair of wrist protectors containing only one protective insert may be worn primarily to protect. We find that the set's essential character is provided by the protective equipment component classifiable in heading 9506.

Holding:

The retail package containing two wristbands, only one of which contains a protective insert, is classified in subheading 9506.99.6080, HTSUS, the provision for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games * * * parts and accessories thereof: Other: Other: Other, Other." The applicable duty rate is 4.64 percent *ad valorem*.

NYRL 858816, dated January 3, 1991, is hereby modified.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A SHOWER SEAT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a shower seat.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after March 13, 1995.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Metals and Machinery Classification Branch, (202) 482–7030).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 16, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 45/46, proposing to revoke New York Ruling Letter (NYRL) 890551 issued on September 28, 1993, by the Area Director of Customs, New York Seaport, concerning the tariff classification of a shower seat for a bathtub under subheading 9403.20.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other metal household furniture. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), hereinafter section 625), this notice advises interested parties that Customs is revoking NYRL 890551 to reflect the proper classification of this shower seat for a bathtub under subheading 9401.79.00, HTSUS, as seats (other than those of heading 9402), whether or not convertible into beds, other seats, with metal frames, other, household. Headquarters Ruling Letter 957201 revoking NYRL 890551 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: December 21, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 21, 1994.

CLA–2 CO:R:C:M 957201 DFC
Category: Classification
Tariff No. 9401.79.00

MR. KEN HASHIMOTO
EXPEDITERS INTERNATIONAL OF WASHINGTON, INC.
578 Eccles Avenue
South San Francisco, CA 94080

Re: Seat, shower; essential character, NYRL 890551 revoked.

DEAR MR. HASHIMOTO:

This is in reference to New York Ruling Letter (NYRL) 890551 issued to you on September 28, 1993, by the Area Director of Customs, New York Seaport, concerning the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of a shower seat. We have reviewed that ruling, issued in response to your letter of August 26, 1993, on behalf of Innovative Lifestyles, Inc., and determined that it is in error. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 890551 was published November 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 45/46.

Facts:

The merchandise involved consists of a Timbo King Shower Seat for the bathtub, Model no. TSS–031. According to the literature provided, the shower seat is used in the bathtub to make a shower safe, relaxing and comfortable. It is constructed of a solid aluminum alloy with cushion rings and double-sided ABS plastic pads and has a loading capacity of up to 300 pounds. All edges are contoured for extra safety. It is suitable for adults and children and the hygienic white color matches any bathroom decor. The dimensions with hanging arms non-extended are approximately 25.6 inches L × 11.8 inches W × 7.9 inches H. With arms fully extended, the dimensions are 39.4 inches L × 11.8 inches W × 7.9 inches H.

In New York Ruling Letter (NYRL) 890551, the Area Director of Customs found that the essential character of the shower seat was imparted by its aluminum components and classified it under subheading 9403.20.00, HTSUS, which provides for other metal household furniture. The applicable rate of duty for this provision is 4% *ad valorem*.

Issue:

Is the shower seat classifiable under subheading 9403.20.00, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided such heading or notes do not otherwise require, according to [the remaining GRI's]." In other words, classification is governed first by the terms of the headings of the tariff and any relative section or chapter notes.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) to the HTSUS, although not dispositive, should be looked to for the proper interpretation of the HTSUS. See T.D. 89–80, 54 FR 35127, 35128 (August 23, 1988). The EN to heading 94.03, at page 1578, reads in pertinent part that "[t]his heading covers furniture and parts thereof, **not covered** by the previous headings * * *." Thus, classification of the product under subheading 9403.20.00, HTSUS, is precluded because the shower seat is provided for under another previous heading. Subheading 9401.79.00, HTSUS, provides for seats (other than those of heading 9402) whether or not convertible into beds, and parts thereof, other seats, with metal frames, other, household.

Inasmuch as the Timbo King Shower Seat is covered by subheading 9401.79.00, HTSUS, classification under subheading 9403.20.00, HTSUS, is precluded.

Holding:

The shower seat is dutiable at the rate of 4% *ad valorem* under subheading 9401.79.00, HTSUS.

NYRL 890551 dated September 23, 1993, is hereby revoked. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION RELATING TO THE SUBSTANTIAL TRANSFORMATION OF HAND TOOLS

ACTION: Notice of proposed modification of past ruling letters; solicitation of comments.

SUMMARY: Pursuant to section 625(c)(1) of Title VI ("Customs Modernization") of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify past rulings pertaining to the substantial transformation of hand tools and similar items in accordance with the court decision in *National Hand Tool Corp. v. United States*, slip op. 9261 (April 27,1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993).

DATES: Comments must be received on or before February 10, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations And Rulings, Attention: Commercial Rulings Division, Franklin Court, 1301 Constitution Avenue, N.W., Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Keith B. Rudich, Special Classification and Marking Branch, (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of Title VI ("Customs Modernization") of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify past rulings pertaining to the processing necessary to substantially transform forgings into finished hand tools and similar items consistent with the court decision in *National*

Hand Tool Corp. v. United States, slip op. 92–61 (April 27, 1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993). Customs proposes to hold that the processing of forgings into finished hand tools and similar items does not result in a substantial transformation where the forging has a predetermined use and it possesses the essential character of the finished tool.

Customs has previously ruled on the amount and kind of further processing which would substantially transform various hand tools. In T.D. 74–12(3), November 1, 1973, Customs determined that the processing of fully machined components of socket wrench sets by heat treating, grinding, vibrating, polishing to remove scale or blemishes resulting from the heat treatment, plating, assembly, inspection and identification marking, does not result in a substantial transformation of the imported components within the meaning of 19 CFR 134.35.

This decision was followed in a subsequent Headquarters Ruling Letter (HRL 711320, March 6, 1981). In that case, socket forgings from Japan were to be processed in the U.S. in the following manner: removal of minor imperfections from the imported socket forgings by a grinding or wrenching process, die-stamping the forging with an appropriate logo, a multi-step heat treatment, vibratory roto-finishing, chrome plating, and further assembly and packing. Customs determined that none of these processes substantially transformed the imported articles.

The underlying rationale for these determinations was that the domestic processing operations were minor finishing operations which did not change the name, character or use of the article. In HRL 721462 (March 17, 1981), Customs applied this rationale and ruled that imported ratchet sets subjected to the various minor finishing operations of the kind described in T.D. 74–12(3) were not substantially transformed, and, therefore, were required to be individually marked with the country of origin. However, in HRL 717662 (October 25, 1991) Customs ruled that the processing performed in HRL 711320 would constitute a substantial transformation if coupled with substantial machining operations *(e.g.* machining the drive end or the wrench end, drilling hole for pin in drive end, and drilling ball and spring hole). *See also* HRL 731572 (July 25, 1989) (forgings imported from Taiwan for manufacture into sockets, socket wrench extensions and adapters and further processed in the U.S. through various operations including lathing, drilling, and centerless grinding, were substantially transformed and excepted from country of origin marking).

It is Customs view that these prior decisions, HRL 717662 and HRL 731572, are inconsistent with the Court of International Trade's decision in *National Hand Tool Corp. v. United States*, slip op. 92–61 (April 27, 1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993). The Court of International Trade held that imported hand tool components which were used to produce flex sockets, speeder handles and flex handles were not substantially transformed when further processed and assembled in the U.S. In that case, the plaintiff imported hand tool components used to

produce flex sockets, speeder handles, and flex handles, used for tightening and loosening nuts and bolts. The sockets and flex handles were cold-formed or hot forged into their final shape prior to importation. The speeder handles were reshaped by a power press after importation. The grip of the flex handles were knurled in the U.S. The articles were heat treated, cleaned, electroplated, and marked with a trademark and size. The imported parts were then assembled with other parts. The court noted that this assembly required some skill and dexterity.

One of the factors considered by the court in reaching its conclusion was that the name of the imported components did not change as a result of the U.S. processing and assembling operations. The court found that the name of each component imported had the same name in the completed tool. The court also determined that there was no substantial change in the character of the articles as a result of the U.S. processing. Moreover, in finding that the use of the imported components did not change as a result of the U.S. processing, the court stated that the use of the imported articles was predetermined at the time of importation; each component was intended to be incorporated in a particular finished mechanic's hand tool. Although the court recognized that only one predetermined use of imported articles does not preclude the finding of substantial transformation, it went on to say that the determination of substantial transformation must be based on the totality of the evidence.

The Customs Service proposes to apply the criteria set forth in *National Hand Tool Corp. v. United States,* in future rulings to determine whether a substantial transformation results from the processing of forgings into hand tools and similar items. These criteria include whether the tool forging has the same name as the finished tool, whether the tool forging has a predetermined use, and whether the tool forging has the essential character of the finished tool. This proposed treatment may be, to a certain extent, inconsistent with C.S.D. 89–121 (July 25, 1989) (HRL 731572 (July 1, 1989)); T.D. 74–12(3) (November 1, 1973); and HRLs 733196 (August 10, 1990), 733579 (August 20, 1990), 732259 (February 16, 1989), 711320 (March 6, 1981), 721462 (March 17, 1981), 717662 (October 25, 1991), 723271 (February 2, 1984), 724270 (January 16, 1984), 721562 (October 17, 1983), 718711 (July 30, 1982); (Attachments A through L to this document, respectively). Therefore, Customs proposes to modify the aforementioned determinations (Attachments A through L) pursuant to *National Hand Tool Corp. v. United States*. Before taking this action, consideration will be given to any written comments timely received. The proposed ruling modifying the aforementioned determinations (Attachments A through L) is set forth in Attachment M to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations, (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: December 23, 1994.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 1, 1989.
MAR 2-05 CO:R:C:V 731572 LR
Category: Marking

RODNEY O. THORSON
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, NW.
Washington, DC 20005

Re: Country of origin marking of sockets.

DEAR MR. THORSON:

This is in response to your letter dated July 1, 1988, on behalf of Mechanics Tools, Inc. requesting an exception from country of origin marking requirements for certain forgings imported from Taiwan for manufacture by its National Hand Tool (NHT) division into sockets, socket wrench extensions and adapters. Representative samples of the rough forgings, samples of the finished tools and a video tape of the processing operations have been submitted. We regret the delay in responding.

Facts:

The imported article is a rough forging produced on either a cold forging press or a former. The operations described below are performed in the U.S. in order to produce a usable socket, extension or adapter. The finished items become parts of a socket set with either ¼", ⅜" or ½" drives, the drive sizes

Domestic Processing:

1. *Lathing*—consists of two metal removal operations to achieve shape and dimensional requirements.
2. *Drilling*—this removes stock from the center of the blank to provide a cavity necessary for bolt and fastener clearance.
3. *Centerless Grinding*—each piece is run between two grinding wheels which grind the outer wall to a specified diameter and wall thickness.
4. *Marking*—the sockets are marked with the size the opening and the brand name.
5. *Heat Treatment*—to assure that the final hardness specifications for the product are met. The process includes heating in a furnace for about 40–50 minutes, placing parts in a "quench tank", washing, and tempering where the items are again put in a furnace and heated to about 600 degrees F. for about one hour.
6. *Hardness and Torque strength Tests performed.*
7. *Sand Blasting*—to remove the scale that has formed during the heat treating process.
8. *Tumbling*—in rotating drums with sand and water to remove metal burrs and smooth surface.
9. *Chemical Vibration*—parts placed in machines with stone media and chemical compound and physically vibrated to polish the parts.

10. *Acid Dip*—immersion into vat of hydrochloric acid to clean parts.
11. *Plating*—by nickel-chrome electroplating process.
12. *Painting*—of inside surfaces to achieve a uniform appearance.
13. *Quality Controls*—of the work in progress at various stages of operations.

Issue:

Whether the above-described processing operations substantially transform the imported articles so that they are excepted from individual country of origin marking requirements.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), generally requires, subject to certain specified exceptions, that every article of foreign origin imported into the U.S. be marked to indicate the country of origin to the ultimate purchaser in the U.S. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. An ultimate purchaser is defined in section 134.1, Customs Regulations (19 CFR 134.1), as "the last person in the U.S. who will receive the article in the form in which it was imported." The regulation further provides if an imported article will be used in manufacture, the manufacturer may be the ultimate purchaser if he subjects the imported article to a process which results in a substantial transformation. However, if the manufacturing process is merely a minor one which leaves the identity of the imported article intact, 19 CFR 134.1(d)(2) provides that the consumer or user of the article, who obtains the article after the processing, will be regarded as the ultimate purchaser.

According to *U.S. v. Gibson-Thomsen Company, Inc.* 27 CCPA 267 (1940), a manufacturer is considered to be an ultimate purchaser if a manufacturing process is performed on an imported item so that the item is substantially transformed in that it loses its identity and becomes an integral part of a new article with a new name, character or use. The court determined that in such circumstances, the imported article is excepted from individual marking. Only the outermost container is required to be marked. *See* section 134.35, Customs Regulations (19 CFR 134.35).

In *Midwood Industries v. United States*, 64 Cust. Ct. 499, C.D. 4026, 313 F. Supp. 951 (1970), the Customs Court considered the effect of U.S. processing on the country of origin marking requirements of imported steel forgings. Although the edges of the forgings were legibly and conspicuously marked with the country of origin at the time of importation, the mark was obliterated or destroyed during the course of the domestic processing. The processes involved in finishing the imported articles included cutting, boring, facing, spotfacing, drilling, tapering, threading, levelling, heating and compressing. The court found that the marking was sufficient because the processing substantially transformed the imported forgings into fittings and flanges. As such, the court found that the U.S. processor was the ultimate purchaser of the imported merchandise and that the removal of the marking during processing was acceptable.

Although the court based its decision in part on the fact that the processing changed a producer's forging to a consumer's flange, the decision makes clear that numerous machining operations were performed in the U.S. which imparted essential characteristics to the forgings that enabled them to be used as fittings and flanges. For example, there was testimony that the rough forgings have no connecting ends and therefore, cannot be used to connect pipes of matching size, the essential purpose of fittings.

Customs has previously ruled on the amount and kind of further processing which would substantially transform a socket blank. In T.D. 74–12(3), November 1, 1973, Customs determined that the processing of fully machined components of socket wrench sets by heat treating, grinding, vibrating, polishing to remove scale or blemishes resulting from the heat treatment, plating assembly, inspection and identification marking, does not result in a substantial transformation of the imported components within the meaning of 19 CFR 134.35.

This decision was affirmed in a subsequent Headquarters Ruling Letter (HQ 711320, March 6, 1981). In that case, socket blank from Japan were to be processed in the U.S. as follows: removal of minor imperfection from the imported socket blanks by a grinding or wrenching process, die-stamping the blanks with an appropriate logo, a multi-step heat treatment, vibratory rotofinishing, chrome plating, and further assembly and packing. Customs determined that none of these processes substantially transformed the imported articles.

The underlying rationale for these determinations is that the domestic processing operations are minor finishing operations which do not change the name, character or use of the article. *See also* HQ 721462 (ratchet set that is subjected to the various minor finishing operations of the kind described in T.D. 74–12(3) are not substantially transformed). In a subsequent ruling involving imported sockets, Customs determined that the processing performed in HQ 711320 *would* constitute a substantial transformation if coupled with substantial machining operations. *See* HQ 717662, October 25, 1981.

In contrast to the forgings in T.D. 74–12(3) and HQ 711320 which were fully machined at the time of importation, in the present case, the forgings are imported in a rough condition with a significant amount of machining to be done to enable the finishing operations to be accomplished. While the imported forgings resemble the size and shape of the finished articles, they are not yet machined to the actual dimensions. In order to achieve the shape and dimensional requirements, the forgings have to be lathed, drilled to remove stock from the center to provide a cavity necessary for bolt and fastener clearance, and ground to make the outer wall a specified diameter and wall thickness. These machining operations unlike the other more cosmetic or minor processing operations such as identification marking, sand blasting, tumbling, and plating, change the fundamental character of the imported article from forgings to sockets, adapters and extensions and enable the product to be used as socket wrench tools. We conclude that the domestic processing substantially transforms the imported forgings into an article with a new name, character or use.

Holding:

For purposes of 19 U.S.C. 1304, the processing of imported forgings in the U.S. in the manner set forth above constitutes a substantial transformation and the U.S. importer/manufacturer is considered the ultimate purchaser. Accordingly, the imported forgings are excepted from country of origin marking under 19 CFR 134.35, provided the district director is satisfied that they will be used only in this manner and will not be otherwise sold and that they will reach the ultimate purchaser in their original containers which are properly marked to indicate the country of origin of the forgings.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs, and Admissibility Branch.

[ATTACHMENT B]

T.D. 74–12(3)

Socket Wrench Set Components, Marking of Country of Origin

The processing of fully machined components of socket wrench sets by heat treating; grinding, vibrating, and polishing to remove scale or blemishes resulting from the heat treatment; plating; assembly; and inspection and identification marking, does not result in a substantial transformation of the imported components, within the meaning of section 134.35 of the Customs Regulations (19 CFR 134.35). Accordingly, the processor is not considered the ultimate purchaser of the imported components.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 10, 1990.

MAR05 CO:R:C:V 733196 KG
Category: Marking

MR. FRED SLY
O-RATCHET, INC.
1362 Exchange Drive
Richardson, TX 75085–0296

Re: Country of origin marking of imported ratchet handle; substantial transformation; forging; 19 CFR 134.35.

DEAR MR. SLY:

This is in response to your letters of March 9, and July 16, 1990, requesting a country of origin ruling regarding imported forgings to be used in the manufacture of ratchets.

Facts:

The forging will be made in Korea or Taiwan. The imported forging has the general shape of a ratchet handle. The processes done in the U.S. include: machining, cleaning, polishing, marking, heat treatment, vibratory polish, cleaning, muratic acid bath, rinse, nickel plate, rinse, chrome plate, and rinse. Heat treatment is required for the metal to be adequate with regard to strength. Plating is necessary to prevent rusting. The completed ratchet handle then has to have the following components or parts added to it in the U.S. in order to be used: the inner body, pawl, reverser, pawl pin, spring, ball, and two retaining rings.

The cost of the forging overseas is $1.89 while the cost of the U.S. processing is $1.21. The cost of the other U.S.-made ratchet parts is $2.70. The reverser, which is made in Taiwan, costs $0.18.

Issue:

Whether the imported rough forging is substantially transformed in the U.S. and therefore, is excepted from individual country of origin marking.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The Court of International Trade stated in Koru North America v. United States, 701 F. Supp. 229, 12 CIT (CIT 1988), that: "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in United States v. Friedlaender & Co., 27 CCPA 297 at 302, C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. An ultimate purchaser is defined in section 134.1, Customs Regulations (19 CFR 134.1), as "generally the last person in the United States who will receive the article in the form in which it was imported." The regulation further provides that if an imported article will be used in manufacture, the manufacturer may be the ultimate purchaser if he subjects the imported article to a process which results in a substantial transformation.

Under section 134.35, Customs Regulations (19 CFR 134.35), an imported article that is substantially transformed in the U.S. is excepted from individual country of origin marking and only the outermost containers of the imported article must be marked with the country of origin. An article is described in U.S. v. Gibson-Thomsen Company, Inc., 27 CCPA 267 (1940), as being substantially transformed because it is "so processed in the U.S. that it

loses its identity in a tariff sense and becomes an integral part of a new article having a new name, character and use."

Imported rough forgings made into flanges and fittings in the U.S. were found to be substantially transformed in the U.S. in Midwood Industries, Inc. v. United States, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970). In that case, the court pointed out that the rough forgings have no commercial use in their imported condition because the forgings are used to connect pipes of a matching size and in their imported state, the forgings had no connecting ends.

In HQ *731572* (July 25, 1989), Customs held that imported rough forgings made into sockets, socket wrench extensions and adapters in the U.S. were substantially transformed. The domestic processing included: lathing, drilling, centerless grinding, marking, heat treatment, performing hardness and torque strength testing, sand blasting, tumbling, chemical vibrating, acid dipping, plating, painting and quality control testing. The rough forgings were considered substantially transformed because a significant amount of machining was done which included machining to achieve the actual dimensions of the tools.

Customs ruled in HQ 732487 (September 20, 1989), that an imported rough forging made into a wrench in the U.S. was substantially transformed. The processes involved in the U.S. included: coining, shot blasting, polishing, grinding, stamping, tempering, chrome plating and calibrating both ends of the wrench. The U.S. processing constituted 55–60% of the total cost of the finished wrench.

Raw forgings for automotive master cylinders and automotive wheel cylinder castings were held to be substantially transformed in HQ 730123 (February 5, 1990). In that ruling, Customs pointed out that the imported parts were subjected to a substantial processing which included: drilling, boring, reaming, tapping and assembly with other U.S.-made parts and which was costly and complex. The imported master cylinder casting is 25.5 % of the finished product and the imported wheel cylinder casting is 15.8%.

In this case, the cost of the U.S.-made parts added in the U.S. is nearly 50% of the finished product. When added with the cost of the U.S. processing, nearly 70% of the manufacturing cost of making this product are for either U.S. processing or for U.S.-made pans which are added to the forging to complete the product. The processing done in the U.S. includes machining, and nickel and chrome plating. While no details were provided concerning the extent of the machining operations performed in the U.S., the processing done in the U.S. considered along with the number and value of U.S.-made parts attached to the finished product, particularly the pawl, constitute a substantial transformation of the imported forging. A ratchet is a piece of machinery which consists of a wheel or a bar with which a pawl engages. A pawl is a pivoted object adapted to engage with the teeth of a ratchet wheel or the like so as to prevent or impart motion. The imported forging involved here is made to hold the pawl. It clearly does not become a ratchet until the pawl is attached to it. In the case, the pawl is made in the U.S. and attached to the ratchet handle in the U.S. The characteristics of the pawl and the parts used to hold the pawl in place so it is functional, which are all U.S.-made, are the very essence of the finished product. Based on all the above considerations, this forging is considered substantially transformed in the U.S. into a ratchet, a new and different article of commerce with a new name, character and use.

Holding:

The imported forging is substantially transformed in the U.S. Pursuant to 19 CFR 134.35, the U.S. manufacturer is considered the ultimate purchaser of the forging. Therefore, only the container in which the forgings are imported are required to be marked with the country of origin of the forging.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs and Admissibility Branch.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 20, 1990.

MAR05 CO:R:C:V *733579* KG
Category: Marking

MR. DICK HARTWIG
REGAL WARE
1675 Reigle Drive
Kewaskum, WI 53040

Re: Country of origin marking of imported aluminum pots and pans.

DEAR MR. HARTWIG:

This is in response to your letter of April 19, 1990, to the U.S. Customs Service office in New York requesting a country of origin ruling regarding imported aluminum pots and pans. Your letter was referred to this office for response.

Facts:

In Venezuela, an aluminum disc is cut from aluminum coil and then stamped to form the part of a pot or pan into which food is placed for cooking. The formed pot or pan is then shipped to the U.S. where the pots and pans are de-burred, (the removal of any rough edges and smoothing off the edges and surfaces of the pot or pan), polished, painted, coated with a non-stick surface and the handle is attached. The finished pots and pans are then packaged for retail. You state that the "ratio of value (time and materials) is 90/10, U.S. vis a vis Venezuela." No supporting figures or data were submitted. A picture of a finished set of pots and pan was submitted.

Issue:

What is the country of origin of the aluminum pots and pans for country of origin marking purposes.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The Court of International Trade stated in Koru North America v. United States, 701 F. Supp. 229, 12 CIT (CIT 1988), that: "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in United States v. Friedlaender & Co., 27 CCPA 297 at 302, C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines the country of origin as "the country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part."

Section 134.35, Customs Regulations (19 CFR 134.35), states that the manufacturer or processor in the U.S. who converts or combines the imported article into a different article having a new name, character or use will be considered the ultimate purchaser of the imported article within the contemplation of section 304(a) of the Tariff Act of 1930, as amended, and the article shall be excepted from marking. The outermost containers of the imported articles shall be marked.

A substantial transformation occurs when articles lose their identity and become new articles having a new name, character or use. United States v. Gibson-Thomsen Co.,

27 C.C.P.A. 267 at 270 (1940), National Juice Products Association v. United States, 10 CIT 48, 628 F. Supp. 978 (CIT 1986), Koru North America v. United States, 12 CIT ____, 701 F. Supp. 229 (CIT 1988).

In National Juice the court upheld Customs ruling that manufacturing concentrate used to make frozen concentrated orange juice and reconstituted orange juice for manufacturing was not substantially transformed. The manufacturing concentrate is the "major part of the end product, when measured by cost, value or quantity" and the further processing in the U.S. to make the manufacturing concentrate into frozen concentrated orange juice was considered a minor manufacturing process. The court noted that the imported product was the very essence of the retail product and that the addition of water, orange essences and oils to the concentrate, while making it suitable for retail sale, did not change the fundamental character of the product. In this case, the imported formed pot/pan is the major part of the end product and the U.S. processing is minor. The formed pot/pan is the very essence of the finished product and the fundamental character of the pot/pan is not changed in the U.S. Besides finishing the pots/pans in the U.S., the only change in character that takes place is the coating of the surface of the formed pot/pan. This change is not fundamental; while it may be more convenient to clean a non-stick pan, it retains its use as a cooking implement.

In HQ *731572* (July 25, 1989), Customs held that imported rough forgings made into sockets, socket wrench extensions and adapters in the U.S. were substantially transformed. The domestic processing included: lathing, drilling, centerless grinding, marking, heat treatment, performing hardness and torque strength testing, sand blasting, tumbling, chemical vibrating, acid dipping, plating, painting and quality control testing. The rough forgings were considered substantially transformed because a significant amount of machining was done which included machining to achieve the actual dimensions of the tools. Customs ruled in HQ *732487* (September 20 1989), that an imported rough forging made into a wrench in the U.S. was substantially transformed. The processes involved in the U.S. included: coining, shot blasting, polishing, grinding, stamping, tempering, chrome plating and calibrating both ends of the wrench. The U.S. processing constituted 55–60% of the total cost of the finished wrench. Further, it was pointed out that the processing performed in the U.S. was similar to HQ 731572; machining is required to drill a cavity for fastener and bolt clearance and the rough forging which will be made into a wrench does not have its basic characteristic until the box end of the rough forging is bored out. This case is distinguishable from HQ *731572* and HQ *732487* because there is not a substantial amount of machining being performed on the formed pots and pans.

The imported aluminium pot/pan is not substantially transformed in the U.S. into a new article with a new name, character or use. Although it is necessary to attach the handle in order for the pot/pan to be functional, the imported article could only be used to make a pot/pan to be used for cooking. The name, character and use of the pot/pan would not change when the handle is attached. The aluminum pot/pan is the very essence of the finished product. A significant amount of work is not done on the pot/pan itself; the processing done on the pot/pan in the U.S. is merely finishing and coating the pot/pan. Since specific prices were not submitted, it is not possible to compare the cost of the foreign and domestic processing.

Since the pots/pans are considered products of Venezuela, they must be marked in accordance with the requirements of 19 CFR Part 134 to indicate that Venezuela is the country of origin.

Holding:

The country of origin of the imported aluminum pot/pan is Venezuela. The imported pot/pan is not substantially transformed in the U.S.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs and Admissibility Branch.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 16, 1989.

MAR05 CO:R:C:V 732259 EAB
Category: Marking

RODNEY O. THORSON
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, DC 20005–2107

Re: Country of origin marking of adjustable wrench made from imported and domestic components.

DEAR MR. THORSON:

This is in reply to your letter of March 24, 1989, on behalf of The Stanley Works, requesting a ruling on the country of origin marking requirements of adjustable wrenches made from two imported components and three U.S. components. We regret the delay in responding.

Facts:

The wrench consists of an imported frame and adjustable jaw, and a domestic knurl, spring and pin. After importation, the frame and adjustable jaw are machined to approximate dimensional standards in a series of metal cutting operations. A channel is cut in the frame to provide access for the movable part of the jaw. A barrel area side hole is broached in the frame to accommodate the domestic knurl. A hole is drilled to accommodate the domestic pin that holds the knurl in the frame. The frame is deburred, then permanently marked with the size, model number and brand name in compliance with ANSI/ASME product specifications. Separately, the adjustable jaw is broached on the active jaw face and at the barrel area, and teeth are cut to accommodate the knurl.

The articles are subjected to recrystallization annealing in a furnace at 1600° F. for 40 minutes, then cooled in an oil bath to set its new molecular structure so as to harden and strengthen it. The wrench is washed and tempered to meet further ANSI/ASME standards. It is smoothed to remove scale and rough edges to prepare it for chrome plating to inhibit corrosion. Assembly of the frame, adjustable jaw, knurl, tension spring and pin completes the manufacturing of the adjustable wrench. As described above, your client makes adjustable wrenches in 4, 6, 8, 10 and 12 inch lengths. You provide cost analyses for each wrench, and we note that the cost of the imported frame and adjustable jaw for the 4″ wrench is 16% of the total manufactured cost; the cost of the 12″ wrench is 34% of the total manufactured cost.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The primary purpose of the country of origin marking statute is to "mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy the product, if such marking should influence his will." United States v. Friedlaender & Co., 27 CCPA 297 (1940); National Juice Products Association v. United States, 10 CIT 48, 628 F. Supp. 978 (1986).

An exception of an article from marking is specifically provided in 19 U.S.C. 1304(a)(3)(D), if the marking of a container of such article will reasonably indicate the origin of such article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(d), Customs Regulations (19 CFR 134.1(d)), defines the ultimate purchaser as generally the last person in the U.S. who will receive the article in the form in which it was imported. However, Section 134.35, Customs Regulations (19 CFR 134.35), provides that articles used in the U.S. in manufacture which results in articles having a name, character or use differing from that of the imported articles will be within the principle of the decision in the case of United States v. Gibson-Thomsen Co., Inc., 27 CCPA 267 (1940). Under this princi-

ple, the manufacturer in the U.S. who converts or combines the imported article into a different article will be considered the ultimate purchaser for purposes of meeting the general requirement of 19 U.S.C. 1304(a).

If the manufacturing process is merely a minor one leaving the identity of the imported article intact, the consumer or user of the article who obtains the article after the processing will be regarded as the ultimate purchaser, 19 CFR 134.1(d)(2). In the case of socket wrench components imported fully machined, Customs has found that finishing operations including heat treating; grinding, vibrating and polishing; plating; assembly; and inspection and identification marking were not a substantial transformation within the meaning of 19 CFR 134.35. Accordingly, the processor was not considered the ultimate purchaser of the imported components, T.D. 74–12(3), November 1, 1973, favorably commented upon in Headquarters Ruling *711320* March 6, 1981. See also Headquarters Ruling *729516*, May 12, 1986: "The final identity and character of the finished tools are established by the manufacturing operations performed in Japan. Although the further processing in the U.S. is essential to finishing the imported items, the processing results in neither a loss of identity nor a new and different product having a new name, character or use."

While mere finishing operations are insufficient to constitute a substantial transformation, if an imported article will be used in manufacture, the manufacturer may be the ultimate purchaser if he subjects the imported article to a process which results in a substantial transformation of the article. A substantial transformation occurs when an article loses its identity and becomes a new article having a new name, character, or use, see United States v. Gibson-Thomsen, 27 CCPA 267 (1940) and National Juice Products Association v. United States, 10 CIT 48, 628 F. Supp. 978 (1986). The degree of technical skill or competence involved in the further work to be done, and the importance of the work to the functioning of the finished article are also considered in determining whether a substantial transformation has occurred. For example, Customs has previously ruled that broaching teeth into plier halves to provide the tool with its working edges, when followed by finishing operations such as grinding, sandblasting, heat treating, tempering, polishing, assembly, electroplating and packaging is a substantial transformation and the U.S. manufacturer is the ultimate purchaser. Broaching teeth was considered a skilled machining operation which imparted essential characteristics to the article, Headquarters Ruling *723271* February 8, 1984 and Headquarters Ruling *721562,* October 17, 1983.

In this case, the frame and adjustable jaw are not fully machined in their condition as imported and lack several important features of a finished wrench. We find that the broaching of the side hole into the frame and the broaching of the adjustable jaw, to accommodate the knurl, and the cutting of the teeth, coupled with the finishing operations that include heat treatment, deburring, tempering, plating, logo, size and model number stamping, and assembly, substantially transform the imported frame and adjustable jaw, and that your client is the ultimate purchaser of the imported articles. Therefore, the frame and adjustable jaw may be excepted from individual marking under 19 U.S.C. 1304(a)(3)(D), provided: (1) the containers in which they are imported are legibly and conspicuously marked to indicate the country of origin; (2) Customs officers at the port of entry are satisfied that the articles will reach your client in the original marked containers, and (3) the articles will be used only in the manufacture of adjustable wrenches as described herein and not otherwise sold. Documentation to such effect may be required by Customs at the time of entry.

Holding:

The imported adjustable wrench frame and adjustable jaw are substantially transformed by your client, thus making your client the ultimate purchaser of the imported articles. The frame and jaw are excepted from marking, provided the containers in which they are imported are marked to indicate the country of origin and Customs officials at the port of entry are satisfied that the articles will be used only in the manner described above and will not be sold otherwise.

MARVIN M. AMERNICK,
Chief,
Special Programs and Admissibility Branch.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 6, 1981.

[ ]
[ ]
[ ]
[ ]

[ ]

This is in response to your memorandum of September 7, 1979, enclosing a copy of a letter of August 21, 1979, from [,] [,] attorneys for [ ], concerning the marking of country of origin requirements applicable to the socket blanks which this firm imports from Japan. We understand that your office approved an exception from individual marking requirements pursuant to 19 U.S.C. 1304(a)(3)(D) on the basis of the facts submitted by the importer concerning the processing the blanks undergo after they are sold to the [ ] of [ ]. In view of a question raised by the examining officer concerning T.D. 74–12(3), you asked for our comments. You submitted a comprehensive statement of the further processing of these blanks in the United States submitted by the attorneys for the importer for our consideration.

We have subsequently received further submissions from [ ] dated November 11, 1980, and January 23, 1981. In addition, an attorney from that firm visited our office on January 23, 1981, accompanied by two representatives from [ ]. Their presentation included both legal argument and a complete description of the further processing to which the imported socket blanks are subjected in the United States. Additional samples of the unfinished and finished articles were submitted.

We understand that (1) the cylindrical surface of the socket blanks are ground to remove all excess metal and materially reduced the dimensions of the rough blanks into sizes more closely approximating those of the finished sockets (2) the blanks are die-stamped with an appropriate logo, (3) the sockets are heat treated and quenched in a multi-step process to eliminate an element of brittleness and toughen the blanks, (4) the sockets are vibratory roto-finished with a burnishing compound which also "de-bevels" the sharpened edges at the top and bottom of the blanks, (5) the articles then undergo two separate plaiting processes with nickle and chrome, and (6) in some instances, the sockets undergo a further assembly process with other component parts.

Section 134.35 of the Customs Regulations (19 C.F.R. 134.35) provides that articles used in the United States in manufacture which results in articles having a name, character, or use differing from that of the imported articles, will b within the principle of the decision in the case of *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98). Under this principle the manufacturer in the United States who converts or combines the imported article into a different article will be considered to be the "ultimate purchaser" for purpose of meeting the general requirement of 19 U.S.C. 1304(a) that all articles of foreign origin must be legibly and conspicuously marked to indicate the country of origin to an ultimate purchaser in the United States.

However, we note that T.D. 74–12(3) provides that the further processing of fully machined components of socket wrench sets by heat treating; grinding, vibrating, and polishing; plating, assembly, inspection and identification marking, dos not result in a substantial transformation of the imported components, within the meaning of section 134.35 of the Customs Regulations (19 CFR 134.35). We are of the opinion that the processing of the sample socket blanks referred to above does not go beyond that which is described in T.D. 74–12(3). Accordingly, the processor would not be considered the ultimate purchaser of the imported components and the exception from marking pursuant to 19 U.S.C. 1304(a)(3)(C) would not be applicable. Since it appears that the imported articles will not reach the ultimate purchasers (retail customers) in the containers in which they are imported, the exception granted under 19 U.S.C. 1304(a)(3)(D) would not be applicable.

With regard to the alternative argument found on page 15 of the August 21, 1979, letter from [,] that, pursuant to 19 CFR 134.33, the socket blanks in question are entitled to the "J-List" exception from country of origin marking require-

ments for "Blanks, metal, to be plated," we have not found in our files any exceptions authorized under this provision. We have several classification decisions in our files under which various types of articles, such as saw blanks, file blanks, key blanks, and wrench blanks were described as blanks, for duty purposes. These articles required further substantial processing after importation, such as the grinding or cutting of teeth in saw or file blanks, ridges in key blanks, and the punching of the socket end of combination wrenches. In the absence of a clear precedent, we are of the opinion that there was no intention to allow a "J-List" exception from marking for metal articles which have been completely manufactured except for finishing operations and plating.

In his additional submissions and oral presentation, the attorney for the importer pointed out that the requirements of 3 representative commercial specifications are not met by the socket blanks in their imported form. The six step heat treatment process used by [ ] was said to change the material makeup of each imported socket blank, so that it can be used in a commercial application. After processing, many of the finished socket blanks are combined with American made wrench handles, retail cases, and other components to produce sockets called "universals." Marking of imported articles which have been marked prior to importation to show Japan as country of origin is said to be economically prohibitive, citing 19 U.S.C. 1304(a)(3)(C) and 19 CFR 134.32(b) as authority for granting an exception from marking requirements.

The prohibitive costs complained of are associated with orienting each piece in the stamping operation to prevent the overprinting of the required country of origin marking. These costs may, in fact, be prohibitive, but they are not the costs for which relief is provided by the law and regulation cited above. No argument is made that the marking of country of origin would be prohibitive. it may be possible for the importer to work out an arrangement with the district director at the port of entry which would permit the stamping of "Japan" on each socket along with the [ ] logo, the socket size, and other information after the arrival of unmarked socket blanks in the United States, provided convenient verification procedures can be worked out.

After full consideration of the facts and arguments presented in this case, we have decided to affirm our previous precedent decisions, including T.D. 74–12(3), that imported unfinished components of socket wrench sets are required to be marked with the country of origin, unless they are substantially transformed in the United States, or an arrangement for marking in the United States is agreed to under conditions outlined above. Our precedent cases indicate that more substantial machining would have to take place in the United States in order to effect a substantial transformation.

You may provide all interested parties with a copy of this decision.

SALVATORE E. CARAMAGNO,
Director,
Entry Procedures and Penalties Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 17, 1983.

This ruling concerns a three-piece ratchet set imported by Sears under their Craftsman line.

Issue:

Whether a three-piece ratchet set must be marked with the country of origin.

Facts:

An unmarked imported three-piece ratchet set has been submitted to Customs.

We understand that this three-piece ratchet set has been manufactured for the Sears Craftsman line by national Hand Tool Corporation. That company has forging facilities in Taiwan and finishing facilities in Texas. It is believed that the subject tools, which are forged, were manufactured in Taiwan. It is suspected that either the tools were imported as

shown from Taiwan or were imported in unfinished condition and subjected to various minor finishing operations in the United States of the kind described T.D. 74–12(3) (1974). A further indication that the tools are imported is the $22 retail price shown, which is well under 50 percent of the price of comparable domestically produced tools.

It is noted that there is no country of origin marking on the tools or, indeed, on the packaging. As a matter of fact, the notation on the package "Chicago, IL" stands to lead customers to believe that the tools are U.S.-made. Thus, there appears to be a violation of 19 CFR section 1304.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) provides generally that all articles of foreign origin or its container imported into the United States must be legibly and conspicuously marked to indicate the English name of the country of origin to an ultimate purchaser in the United States.

Section 134.35, Customs Regulations, (19 CFR 134.35) states that an article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision in the case of *United States v. Gibson Thomsen Co. Inc.*, 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), and the article shall be excepted from marking.

In T.D. 74–12(3), Customs ruled as follows:

> *Socket wrench set components, marking of country of origin.*—The processing of fully machined components of socket wrench sets by heat treating: grinding, vibrating, and polishing to remove scale or blemishes resulting from the heat treatment; plating; assembly; and inspection and identification marking, does not result in a substantial transformation of the imported components, within the meaning of section 134.35 of the Customs Regulations (19 CFR 134.35). Accordingly, the processor is not considered the ultimate purchaser of the imported components.

We believe that in this case, the process in T.D. 74–12(3) would not be sufficient to substantially transform the imported items into a new and different product, therefore the individual prices in the sets must be marked with the country of origin.

Holding:

The individual pieces in the ratchet set must be individually marked with the country of origin to meet the requirements of 19 U.S.C. 1304.

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 23, 1981.

MAR–2–05 CO:R:E:E

DEAR [ ]:

This is in response to your letter of September 21, 1981, concerning the country of origin marking requirements applicable to socket wrench blanks imported from Japan by [ ] and processed in the United States into sockets by [ ]. You referred to our decisions of March 6, and June 30, 1981, which held that the imported socket blanks would have to undergo more substantial machining in the United States in order to qualify for the marking exception set forth in Section 134.35 of the Customs Regulations (19 CFR 134.35) for articles used in the United States in manufacture which results in articles having a name, character, or use differing from that of the imported article.

Your letter outlines the additional machining operations which [ ] now proposes to perform in the United States. These operations will replace operations presently being performed by the Japanese producer. [ ] presently performs the following operations: (a) removal of minor imperfections from the imported socket blanks by a grinding or wrenching process, (b) die-stamping the blanks with an appropriate logo, (c) a multi-step heat treatment, (d) vibratory rotofinishing, (e) chromeplating or black oxide surface coating, and (f) further assembly and packing in certain cases. In addition to the above, [ ] how proposes to perform the following machining operations: (1) machine (face) the drive end or the wrench end, *or* (2) drill web, (3) drill hole for pin in drive end, (4) machine recess in drive end, (5) drill ball and spring hole. Drawings were submitted which illustrate the further processing referred to above.

We are of the opinion that the additional machining processes referred to above to be performed by [ ] in the United States amounts to a substantial transformation of the imported socket blanks by a process of manufacture which results in articles having a name, character and use differing from that of the imported articles. Accordingly, the imported socket blanks may be excepted from individual marking pursuant to 19 U.S.C. 1304(a)(3)(D), if the containers in which they are imported are lengthy and conspicuously marked to indicate the country of origin, and Customs officers at the port of entry and satisfied that the blanks will reach the ultimate purchaser in the United States [ ] the original marked containers in which imported, and will be used only in the manufacture of finished sockets and not otherwise sold. Your client should be prepared to furnish statements or affidavits to this effect for each entry for which this exception is requested.

ANTHONY L. PIAZZA,
Acting Director,
Entry Procedures and Penalties Division.

[ATTACHMENT I]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 2, 1984.

MAR 2-05 CO:R:E:E

MR. EDWARD I. WEAVER
PLANT MANAGER
CRESCENT/XCELITE PLANT
P.O. Box 2096
Sumter, SC 29150

DEAR MR. WEAVER:

In response to your letter of September 15, 1983, please find enclosed a ruling exempting imported forgings from country of origin marking requirements. Because the ruling holds that the imported forgings will be substantially transformed into new and different articles of commerce, the finished slip joint pliers may be considered products of the United States, but may be marked "USA" only if the Federal Trade Commission approves.

DARRELL D. KAST,
Chief,
Licensing and Restricted Merchandise Branch.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

MAR 2–05 CO:R:E:E

This ruling concerns country of origin marking requirements for imported slip joint plier forgings.

Issue:

Whether imported plier forgings, which are to be further machined and finished into slip joint pliers, are substantially transformed in the United States for purposes of the exemption from country of origin marking set forth in 19 U.S.C. 1304(a)(3)(D).

Facts:

An American company imports plier forgings which are not fully machined. In their condition as imported, the forgings have been forged, trimmed, sandblasted, and coined to size. In the United States, the subject company will punch single and double holes in the plier halves, form-machine to broach teeth into the plier halves, and then perform finishing operations including grinding, sandblasting, heat treating, hardening, tempering, polishing, assembling, electroplating, and packaging. In addition to the further machining for broaching teeth into the plier halves which takes place in the United States, the operations performed domestically are labor intensive.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides in general that unless exempted, all articles of foreign origin imported into the United States must be legibly and conspicuously marked to indicate the English name of the country of origin to the ultimate purchaser in the United States.

The ultimate purchaser is generally the last person in the United States who will receive the article in the form in which it was imported. 19 CFR 134.1(d). If the American company processing the plier forgings into finished tools "substantially transforms" the forgings into new and different articles, then such company will be considered the ultimate purchaser and we will exempt the forgings from country of origin marking under 19 U.S.C. 1304(a)(3)(D). 19 CFR 134.35; *United States v. Gibson-Thomsen*, 27 C.C.P.A. 267, C.A.D. 98 (1940).

In their condition as imported, the plier forgings are not fully machined. Further machining, *i.e.*, breaching teeth into the plier halves, performed in the United States, provides the tool with its working edges. This machining combined with the finishing operations, domestically performed, constitutes approximately 67–86 percent of the total cost of producing the finished slip joint pliers.

It is our position that the subject company "substantially transforms" the imported forgings into finished slip joint pliers. Thus, we believe that the subject importer-processor is the ultimate purchaser of the plier forgings. Therefore, the plier forgings may be excepted from individual marking under 19 U.S.C. 1304(a)(3)(D) provided: (1) The containers in which the forgings are imported are legibly and conspicuously marked to indicate the country of origin; (2) Customs officers at the port of entry are satisfied that these forgings will reach the subject company in the original marked containers in which imported; and (3) the forgings will be used only in the manufacture of the slip joint pliers as described herein and not otherwise sold. Statements or affidavits to this effect must be submitted for each entry for which this exception is requested.

Holding:

Imported plier forgings, further machined in the United States (by broaching teeth into the plier halves) and finished into slip joint pliers, are "substantially transformed" by the American importer-processor who is deemed to be the "ultimate purchaser" of the forgings; the forgings are thereby exempted from individual country of origin marking under 19 U.S.C. 1304(a)(3)(D).

DARRELL D. KAST,
Chief,
Entry, Licensing and Restricted Merchandise Branch.

[ATTACHMENT J]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 16, 1984.

MAR 2-05 CO:R:E:E

STEPHEN M. CRESKOFF, ESQ.
HARRIS, BERG & CRESKOFF
1100 15th Street, NW.
Washington, DC 20005

DEAR MR. CRESKOFF:

This is in reply to your letter of January 3, 1984, on behalf of National Hand Tool Corporation, requesting an exemption from country of origin marking requirements in the case of flat wrench blanks from Korea.

In their condition as imported, the subject wrench blanks are not fully machined and cannot be used as tools. Following importation, your client will perform additional machining processes, including broaching, in order to give the tool its working ends. For instance, the box end of the wrench blank will be broached with teeth. Broaching will also be performed to form the opened end of the wrench. The tool will then be heat treated, sand blasted, polished, acid cleaned, and plated. The cost of domestic manufacturing far outweighs the cost of the imported article.

It is our position that your client "substantially transforms" the imported wrench blanks into finished tools and is therefore considered to be the "ultimate purchaser" of the imported articles. 19 CFR 134.35; *United States v. Gibson-Thomsen,* 27 C.C.P.A. 267, C.A.D. 98 (1940); Headquarters decision dated July 30, 1982, file No. 718711. Accordingly, the subject wrench blanks may be excepted from individual marking under 19 U.S.C. 1304(a)(3)(D) provided: (1) the containers in which the blanks are imported are legibly and conspicuously marked to indicate the country of origin; (2) Customs officers at the port of entry are satisfied that these articles will reach your client in the original marked containers in which imported; and (3) the articles will be used only in the manufacture of finished wrenches as described herein and not otherwise sold. Statements or affidavits to this effect must be submitted by your client for each entry for which this exception is requested.

DARRELL D. KAST,
Chief,
Entry, Licensing and Restricted Merchandise Branch.

[ATTACHMENT K]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 17, 1988.

[ ]
[ ]
[ ]
[ ]

DEAR [ ]:

This is in response to your submissions [ ] requesting that certain ratchet wrench handles be excepted from country of origin marking requirements imposed by 19 U.S.C. 1304. The exception is requested pursuant to section 134.35, Customs Regulations (19 CFR 134.35), on the ground that the imported ratchet wrench handles will be substantially transformed in the United States by the importer, [,] which claims to be the "ultimate purchaser" for purposes of the statutory exemption set forth in 19 U.S.C. 1304(a)(3)(D).

[ ] imports from Taiwan an unfinished ratchet wrench handle which, *prior to importation,* is forged, pierced, and machined to form a handle and

recessed core opening for the insertion of a core mechanism. The core mechanism is also imported, but consists of unfinished, unplated, and unassembled parts (shifter caps and core shells) as well as finished parts (balls, springs, powls, powl pins, powl springs, powl buttons and retainer rings).

Following importation, the ratchet wrench handle is further machined by the importer [ ] and finished for resale. Further machining in this instance refers to "broaching" which is the cutting of teeth into the recessed core opening, and "knurling" which cuts a series of grooves in the handle to facilitate gripping. Finishing operations are then performed, i.e., the handle is heat-treated, belt polished, "fast cut" and "finished cut" vibrated, acid-cleaned, and chrome-plated. The core mechanism parts are also finished and assembled into the core opening to form the finished ratchet wrench handle.

The issue is whether the operations performed by the importer following importation "substantially transform" the imported article. If so, then the importer [ ] will be considered the "ultimate purchaser" of the imported ratchet wrench handles, and the imported handles will be excepted from marking. 19 CFR 134.35; *United States v. Gibson-Thomsen,* 27 C.C.P.A. 267, C.A.D. 98 (1940).

In their condition as imported, the subject handles are not fully machined. Broaching and, in most cases, knurling, must be performed. According to [ ] broaching of teeth in the handle cores is a critical stage of production domestically performed by highly skilled machinists. The importer also claims that more than half of the total work time needed to complete the ratchet wrench handle is performed in the United States. More than half the production cost is claimed to be incurred in the United States, as well. In sum, [ ] claims that the machining operations performed in the United States, added to the finishing and assembly operations substantially transform the imported product, and that [ ] is the ultimate purchaser of the imported handles.

The ultimate purchaser is generally the last person in the United States who will receive the article in the form in which it was imported. 19 CFR 134.1(d). In *Gibson-Thomsen,* the 1940 appeals court found the ultimate purchaser to be the manufacturer or processor who converted or combined the imported article into a new article having a new name, character and use. This finding has been cited as the "substantial transformation" test. Although the imported articles in *Gibson-Thomsen* identity, subsequent court decisions have recognized that a commercial transformation can take place whereby producers' goods are substantially transformed into consumers' goods by a key processing operation without *Industries, Inc. v. United States,* 64 Cust. Ct. 499, C.O. 4026 (1970) (forgings imported in dimensions as close as possible to the fitting and flanges into which the forgings were held substantially transformed). The note in this regard subsection 134.1(d)(1) which states that a "manufacturer may be the 'ultimate purchaser' if he subjects the imported article, *even though the process may not result in a new or different article"* (emphasis added). For the purpose of satisfying the substantial transformation test, it is significant that the key manufacturing processes performed in the United States are costly and time consuming in comparison to the processes performed abroad. *Uniroyal, Inc. v. United States,* 542 F. Supp. 1026 (C.I.T. 1982).

We are satisfied, for the purpose of the substantial transformation test as applied by these decisions, that the machining operations performed domestically upon the imported ratchet wrench handles, particularly the broaching process, added to the finishing operations also performed domestically, result in an article different in a tariff sense from the imported article. As the record indicates, the broaching of teeth into the core opining is an essential machining process which requires special machinery and skilled operation. Without precisely machined teeth in the core opining of the handle, the ratchet mechanism could not operate and would be useless to anyone except the producer-importer, [ ]. Furthermore, the various components of the core mechanism are not merely assembled, but also merged into the ratchet handle to form a unified whole. Clearly, there parts lose their identity when the ratchet wrench handle is completed into a functional consumer article.

Accordingly, we find [ ] to be the "ultimate purchaser" of the imported handles and core mechanism parts. Therefore, the handles and core mechanism parts may be excepted from individual marking under 19 U.S.C. 1304(a)(3)(D) provided: (1) the containers in which they are imported are legibly and conspicuously marked to indicate the country of origin; (2) Customs officers at the port of entry are satisfied that these articles will reach [ ] in the original marked con-

tainers in which imported, and (3) the articles will be used only in the manufacture of finished ratchet wrench handles as described herein and not otherwise sold. Statements or affidavits to this effect must be submitted [ ] for each entry for which this exeption is requested.

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

[ATTACHMENT L]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 30, 1982.

This ruling concerns the country of origin marking requirements for imported flat wrench forgings.

Issue:

Whether the additional work done to imported flat wrench forgings is enough to constitute a substantial transformation.

Facts:

The importer has submitted to Customs two samples showing an imported flat wrench forging (sample 2) and a finished wrench (sample 1). The forging is not capable of being used for the use normally attributed to a flat wrench.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended, (19 U.S.C. 1304), provides generally that all article of foreign origin imported into the United States must be legibly and conspicuously marked to indicate the English name of the country of origin to an ultimate purchaser in the United States.

Section 134.1(d)(1) of the Customs Regulations (19 CFR 134.1(d)(1)), holds the manufacturer to be the "ultimate purchaser" if he subjects the imported article to a process which results in a substantial transformation, changing the character and use of the imported article which loses its identity in the manufacturing process. Substantial transformation means that the manufacturing process is performed on an item so that the item loses its identity and becomes and integral part of a new article with a new name, character and use *(United States v. Gibson-Thomsen Co., Inc.,* 27 C.C.P.A. 267, C.A.D. 98).

We are of the opinion that the additional machining process shown by your samples amounts to a substantial transformation. The crucial shaping of the two ends of the wrench to create the grooves for performing the intended function of the wrench is done in the United States.

Accordingly, the imported forgings (sample No. 2) may be excepted from individual marking pursuant to section 304(a)(3)(D) of the Tariff Act of 1930, as amended (19 U.S.C. 1304(a)(3)(D)), if the containers in which they are imported are legibly and conspicuously marked to indicate the country of origin, and Customs officers at the port of entry are satisfied that the forgings will reach the ultimate purchaser in the United States (Stanley Works) in the original marked containers in which imported, and will be used only in the manufacture of finished wrenches (sample No. 1) and not otherwise sold. You should be prepared to furnish statements or affidavits to this effect for each entry for which this exception is requested.

DARRELL D. KAST,
Director,
Licensing and Restricted Merchandise Branch.

[ATTACHMENT M]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

MAR–2–05 CO:R:C:S 734564 KR
Category: Marking

STEPHEN M. CRESKOFF
1819 H Street, N.W., Suite 550
Washington, DC 20006

Re: Country of origin of imported wrench forgings; substantial transformation; 19 CFR § 134.35; *United States v. Gibson-Thomsen Company. Inc.; National Hand Tool Corp. v. United States;* T.D. 74–12(3); HRL 711320; HRL 717662; HRL 721462; HRL 723857; HRL 731572; Article 509, NAFTA.

DEAR MR. CRESKOFF:

This is in response to a letter from Kingsley Tools Corporation dated December 15, 1993, superseded by your letter dated March 31, 1994, and supplemented by a meeting on August 25, 1994, and a letter dated September 1, 1994, on behalf of Kingsley Tools Corporation, requesting a prospective and binding country of origin ruling regarding marking requirements applicable to certain imported socket wrench forgings, ratchet wrench forgings and components, and flat wrench forgings.

Facts:

You state that Kingsley Tools Corporation intends to import certain forgings manufactured in Taiwan, China, and Mexico, and possibly other countries in the future. The forgings will include: ratchet handle forgings, combination wrench forgings, open end wrench forgings, box end wrench forgings, and socket forgings (hereinafter "wrenches"). The steel "web" will still exist at the socket opening or wrench mouth at the time of importation for each forging type.

The flat wrenches (open and box end) will undergo the following production steps in the U.S.:

1. Incoming inspection.
2. Punch out steel web from open ends.
3. Broach (cutting teeth into the recessed core opening) open ends to proper size.
4. Broach box end.
5. Stamp name and size on product.
6. Harden, temper and draw.
7. Sand blast.
8. Straighten shape.
9. Polish ends.
10. Final polish ends and buff.
11. Polish open end and two faces.
12. Wash and pre-treatment.
13. Nickel and chrome plating.
14. Quality control inspection.
15. Packaging for shipment.

Some of the flat wrench forgings sizes may be used to make more than one size of the finished flat wrenches. You state that 80% of the wrenches will be sold in sets, and 20% will be sold individually.

You also intend to import unfinished ratchet wrench handle forgings. Prior to importation, the forging will be pierced and machined to form a handle and recessed core opening for the insertion of a core mechanism. The core mechanism is assembled in the U.S. and consists of unfinished core shell called a "D-lug" which is imported; and balls, ball springs, shift cap, solid pin, hollow pin, pawls, pawl springs, and retainer rings which may be sourced in the U.S. or abroad. After importation, the handle is broached, and knurled (cutting a series of grooves in the handle to facilitate gripping). The handle then is heat treated, belt polished, vibrated, acid cleaned, and chrome plated. The core mechanism parts will be finished and assembled into the core opening to form the finished ratchet handle. The core mechanism finishing and assembly steps include:

1. Drill the hole in the square tang of the D-lug for the steel ball.
2. Deburr the D-lug.

3. Heat treat the D-lug.
4. Sandblast the D-lug.
5. Belt polish the D-lug.
6. Plate the D-lug.
7. Assemble steel ball and ball spring using hydraulic punch press to stage the steel ball permanently in the core.
8. Insert the pawl and pawl pin into the core with the hydraulic punch press to permanently seat the pawl pin in the core.
9. Assemble the pawl spring into the hollow pin.
10. Assemble the spring and pin in the shift cap and put into the core.

You state that ⅔ of the handles will be incorporated into "socket sets", and ⅓ of the handles will be sold individually.

You state that you will also import socket forgings and perform the following production steps:

1. Rough grinding.
2. Lathing to shape and dimension. For small sockets—drill the clearance hole and lathe the "neck down" nut end. For large sockets—lathe the square drive end and lathe the "neck down" drive end.
3. Lathe the ball recess hole and chamfer the drive edges.
4. Drilling to remove stock from the center to provide the cavity for bolt clearance.
5. Centerless grinding of the outer wall to diameter and wall thickness.
6. Marking with size and name.
7. Heat treating to harden (furnace heating, cooling in quenching tank, washing, tempering by reheating).
8. Hardness and torque strength testing.
9. Sand blasting to remove scale from heat treating.
10. Tumbling in rotating drums to smooth.
11. Vibrating with stones and chemicals to polish.
12. Immersing in acid bath to clean.
13. Nickel plating, then chrome plating.
14. Painting inside surfaces for uniform appearance.
15. Checking for quality control.
16. Packaging.

You state that 80% of the sockets will be sold in sets, and 20% of the sockets will be sold individually. You state that less than seven percent of the value of the 54 piece socket set will derive from the imported forgings. You expect the value of the imported forgings in a 96 piece socket set (currently averaging over 17 percent) to be less than seven percent once an expected purchase of a new cold press machine to make larger size sockets in the U.S. occurs.

You state that the processing in the U.S. is substantially more expensive than the imported forgings. You state that the unfinished wrench forgings and parts will be classified under the same HTSUS classification as the finished wrenches, HTSUS 8204.11, 8204.12, and 8204.20, respectively. You are requesting an exception from country of origin marking because you believe the imported components are substantially transformed by the processing in the U.S.

Issue:

Whether the above-described processing operations performed in the U.S. substantially transform the imported wrench forgings so that they are excepted from individual country of origin marking requirements.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlander & Co.*, 27 C.C.P.A. 297 at 302; C.A.D. 104 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and the exceptions of 19 U.S.C. 1304. Section 134.1(b), Customs Regulations (19 CFR 134.1(b), defines "country of origin" as the country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the (meaning of the marking laws and regulations. The case of *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940), provides that an article used in manufacture which results in an article having a name, character or use differing from that of the constituent article will be considered substantially transformed. In such circumstances the U.S. manufacturer is the ultimate purchaser. The imported article is excepted from individual marking and only the outermost container is required to be marked. *See* 19 CFR 134.35.

A substantial transformation occurs when an article loses its identity and becomes a new article having a new name, character or use. *United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267 at 270(1940); *National Juice Products Association v. United States*, 628 F. Supp. 978, 10 CIT 48 (CIT 1986); *Koru North America v. United States*, 701 F. Supp. 229, 12 CIT 1120, (CIT 1988).

A. *Prior to National Hand Tool Corp. v. United States:*

Customs has ruled on several occasions on whether the processing of forgings into finished or semifinished metal articles is a substantial transformation. In determining whether there is a substantial transformation, Customs has looked at the specific processing operations. In HRL 055703 (September 24, 1979), Customs ruled that a German forging sent to Malaysia for milling and machining, including widening the holes for joining matching pieces, machining small ridges for locking or gripping and machining to define the edges and surfaces, was substantially transformed into a surgical instrument whose country of origin was Malaysia. In HRL 553197 (February 11, 1985), Customs determined that the machining of forgings in the U.S., consisting of deburring, milling, assembly and riveting constituted a substantial transformation. In that same ruling, Customs found that the subsequent rough polishing, hand shaping and curving, heat treatment and final polishing of the instruments in Pakistan was not a substantial transformation. *See* HRL 732844 (February 12, 1990) (the machining operations substantially transformed rough forgings of surgical equipment); and HRL 555536 (October 29, 1990) (machining operations but not heat treating of forgings substantially transformed surgical instruments).

In C.S.D. 90–53 (February 12, 1990), Customs ruled that while the U.S. forgings may have resembled the size and shape of the finished articles, they were not yet machined to their actual dimensions and lacked essential characteristics such as the capacities to grip, close, lock in place and to be adjusted. Without the machining, bending, cutting, rivetting, assembly and polishing operations, the articles would not have been useful for their purpose and did not have the characteristics thereof. In HRL 732615 (June 6, 1990), Customs ruled that surgical scissors underwent a substantial transformation after forging by refining the shape and grinding, joining and riveting, polishing, adjusting, and buffing. In a case similar to the instant situation, C.S.D. 89–121 (July 25, 1989), Customs stated that:

> While the imported forgings resemble the size and shape of the finished articles, they are not yet machined to the actual dimensions. In order to achieve the shape and dimensional requirements, the forgings have to be lathed, drilled to remove stock from the center to provide a cavity necessary for bolt and fastener clearance, and ground to make the outer wall a specified diameter and wall thickness. These machining operations, unlike the other more cosmetic or minor processing operations * * * change the fundamental character of the imported article from forgings * * *.

See also HRL 733196 (August 10, 1990), HRL 731572 (July 1, 1989), HRL 733579 (August 20, 1990), 732259 (February 16, 1989); *but see* HRL 734246 (October 21, 1991), HRL 734167 (September 13, 1991).

Customs has previously ruled on the amount and kind of further processing which would substantially transform a socket forging. In T.D. 74–12(3), November 1, 1973, Customs determined that the processing of fully machined components of socket wrench sets by heat treating, grinding, vibrating, polishing to remove scale or blemishes resulting from the heat treatment, plating, assembly, inspection and identification marking, does not result in a substantial transformation of the imported components within the meaning of 19 CFR 134.35.

This decision was affirmed in a subsequent Headquarters Ruling Letter (HRL 711320 (March 6, 1981)). In that case, socket forgings from Japan were to be processed in the U.S.

in the following manner: removal of minor imperfection from the imported socket forgings by a grinding or wrenching process, die-stamping the forgings with an appropriate logo, a multi-step heat treatment, vibratory roto-finishing, chrome plating, and further assembly and packing. Customs determined that none of these processes substantially transformed the imported articles.

The underlying rationale for the determinations in T.D. 74–12(3) and HRL 711320, is that the domestic processing operations are minor finishing operations which do not change the name, character or use of the article. In HRL 721462 (March 17, 1981), Customs applied this rationale and ruled that imported ratchet sets subjected to the various minor finishing operations of the kind described in T.D. 74–12(3) are not substantially transformed, and, therefore, are required to be individually marked with the country of origin. However, in HRL 717662 (October 25, 1991) Customs ruled that the processing performed in HRL 711320 would constitute a substantial transformation if coupled with substantial machining operations *(e.g.* machining the drive end or the wrench end, drilling hole for pin in drive end, drilling ball and spring hole). *See also* HRL 731572 (July 25, 1989) (forgings imported from Taiwan for manufacture into sockets, socket wrench extensions and adapters and further processed in the U.S. through various operations including lathing, drilling, and centerless grinding, were substantially transformed and excepted from country of origin marking).

B. *National Hand Tool Corp. v. United States:*

The court has recently established a definitive test for determining if a hand tool undergoes a substantial transformation. In this paramount case concerning the substantial transformation of hand tools, the Court of International Trade held in *National Hand Tool Corp. v. United States*, slip op. 92–61 (April 27, 1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993), that imported hand tool components which were used to produce flex sockets, speeder handles and flex handles were not substantially transformed when further processed and assembled in the U.S. In that case, the plaintiff imported hand tool components used to produce flex sockets, speeder handles, and flex handles, used for tightening and loosening nuts and bolts. The sockets and flex handles were coldformed or hot forged into their final shape prior to importation. The speeder handles were reshaped by a power press after importation. The grip of the flex handles were knurled in the U.S. The articles were heat treated, cleaned, electroplated, and marked with a trademark and size. The imported parts were then assembled with other parts. The court noted that this assembly required some skill and dexterity. The flex socket was assembled from a tang end of flex socket and a drive socket with a connection block, two pins and two tension springs. A speeder handle was combined with a spring-loaded ball in an operation called "stagging" or "staking" (wherein a spring-loaded ball was inserted into the cavity at the end of the handle component and the cavity was then partially closed), the handle was then assembled with a knurled grip with one pin and one spring. The flex handle was assembled from a lug and a handle component, a spring and a ball were inserted in the lug by a "stagging" operation, and assembled with the handle with a threaded fastener screw and a tension spring. One of the factors considered by the court in reaching its conclusion was that the name of the imported components did not change as a result of the U.S. processing and assembling operations. The court found that the name of each article imported had the same name in the completed tool. In support of this conclusion, the court cited the following example:

> For example, when the lug or "G-head", component of a flex handle imported from Taiwan (Ex. E) was shown, plaintiff's witness called it a "G-head". When the government counsel asked the name of the part where the lug component is attached to a completed flex handle (Ex. J.), the witness also called it a "G-head".

The court found that the "character of the articles remained unchanged after heat treatment, electroplating and assembly." The court also considered whether the use of the imported components changed as a result of the processing and assembling operations performed in the U.S. In finding that the use of the imported components did not change, the court stated that the use of the imported articles was predetermined at the time of importation; each component was intended to be incorporated in a particular finished mechanic's hand tool. Although the court recognized that only one predetermined use of imported articles does not preclude the finding of substantial transformation *(see, Torrington Co. v. United States*, 764 F.2d 1563 (1985)), it went on to say that the determination of substantial transformation must be based on the totality of the evidence.

Similarly, in this case, based on the totality of the evidence, we find that the U.S. operations do not result in a substantial change in the name, character, or use of the imported forgings of the sockets, flat wrenches or ratchet handle.

The processing operations, described above, performed to the wrenches does not change the name, character, and use of the imported forgings. *See* HRL 711320. The imported forgings have the essential characteristics of the finished article. The articles retained the same name as prior to the U.S. processing. *See National Hand Tool Corp. v. United States, supra*. The forgings contain the essential character of the finished products, and the use of the forgings is totally predetermined at the time of their importation. The ratchet handle undergoes similar processing as the flat wrenches and sockets above. However, the ratchet handle forging must also be combined with the core assembly in the U.S. to create the finished ratchet wrench. We find that the assembly of the core mechanism is a simple assembly operation, and does not amount to a substantial transformation. Therefore, we find that Kingsley Tools Corporation is not the ultimate purchaser of the imported socket forgings, flat wrench forgings or ratchet handle from Taiwan and China; and the country of origin must be marked on the finished socket, flat wrench and ratchet handle.

C. *NAFTA:*

The forgings imported from Mexico must be viewed under a different analysis. The country of origin marking requirements for goods of a NAFTA country are also determined in accordance with Annex 311 of the North American Free Trade Agreement, as implemented under the North American Free Trade Implementation Act ("NAFTA") (Pub. L. 103–182, 107 Stat. 437 (December 8,1993)); implemented by T.D. 94–4, NAFTA Interim Regulations (59 Fed. Reg. 110 (January 3,1 994)) (to be codified at 19 CFR Parts 12, 102 and 134) as amended (59 Fed. Reg. 5082 (February 3, 1994) and T.D. 94–1 (59 Fed. Reg. 69460, December 30, 1993)). These interim amendments took effect on January 1, 1994, to coincide with the effective date of the NAFTA. The marking rules used for determining whether a good is a good of a NAFTA country are contained in T.D. 94–4 (adding a new Part 102, Customs Regulations). The marking requirements for these goods are set forth in T.D. 94–1 (interim amendments to various provisions of Part 134, Customs Regulations).

Section 134.1(b) of the interim regulations, defines "country of origin" as:

> the country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the "country of origin" within this part; *however, for a good of a NAFTA country. the NAFTA marking rules will determine the country of origin*. (Emphasis added).

Section 134.1(j) of the interim regulations, provides that the "NAFTA marking rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) of the interim regulations, defines a "good of a NAFTA country" as an article for which the country of origin is Canada, Mexico, or the U.S. as determined under the NAFTA marking rules. Section 134.45(a)(2) of the interim regulations, provides that a "good of a NAFTA country" may be marked with the name of the country of origin in English, French or Spanish.

In order to determine the country of origin marking requirements, we must first apply the NAFTA marking rules in order to determine whether the imported wrenches are "a good of a NAFTA country", prior to being further processed in the U.S.

Part 102 of the interim regulations, sets forth the NAFTA marking rules for purposes of determining whether a good is a good of a NAFTA country for marking purposes. Section 102.11 of the interim regulations, sets forth the required hierarchy for determining country of origin for marking purposes. Section 102.11(a) of the interim regulations states that "[t]he country of origin of a good is the country in which:

> (1) The good is wholly obtained or produced;
> (2) The good is produced exclusively from domestic materials; or
> (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other requirements of these rules are satisfied."

Applying the NAFTA rules of origin set forth in Part 102 of the interim regulations to the facts of this case, we find that, pursuant to section 102.11(a)(3), the imported wrench forgings from Mexico are a good of a NAFTA country prior to being further processed in the U.S. In this case, U.S. steel under HTSUS chapter 72 is imported into Mexico and undergoes the necessary tariff classification change to wrench forgings under HTSUS 8204 as set out in

section 102.20(o), Section XV: Chapter 82, 8203.10–8207.90 of the interim regulations, which states: "A change to subheading 8203.10–8207.90 from any other subheading, including another heading within that group." Therefore, a change in the tariff classification does take place, and the U.S. steel becomes a product of Mexico once it is forged.

The only issue which remains is whether the U.S. processor of the steel forgings is the ultimate purchaser of this product when imported into the U.S. from Mexico within the meaning of section 134.35(b). Section 134.35(b) of the interim regulations, provides that:

> a good of a NAFTA country which is to be processed in the United States in a manner that would result in the good becoming a good of the United States under the NAFTA marking rules is excepted from marking. Unless the good is processed by the importer or on its behalf, the outermost container of the good shall be marked in accord with this part.

Based on the facts of the case, we find that the wrench forgings imported from Mexico do not become products of the U.S. under Part 102 of the interim regulations as a result of the further processing performed in the U.S. General Rules of Interpretation ("GRI") 2(a) states:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article.

We find that the imported components are classifiable as the finished tool because, as discussed above, we find that the imported article is simply the "incomplete or unfinished article" which has the "essential character" of the completed tool. Therefore, pursuant to Section 102.11(a)(3), the parts do not undergo the applicable change in tariff classification.

Section 102.11(b) states that where the country of origin can not be determined pursuant to Section 102.11(a), the country of origin is "the country or countries of origin of the single material that imparts the essential character of the good". As discussed above, the imported components contain the essential character of the finished ratchet wrenches, sockets and flat wrenches. The processing and/or minor parts added in the United States does not alter this. Therefore, the country of origin of the finished ratchet wrenches, sockets and flat wrenches is determined by the country of origin of the imported forgings. Accordingly, the imported ratchet wrenches, socket forgings and flat wrench forgings which are goods of a NAFTA country that retain the same country of origin after the processing performed in the U.S., must still be marked with the country of origin, Mexico.

Holding:

For purposes of 19 U.S.C. 1304, the processing in the U.S. of the wrench forgings imported from Taiwan and China in the manner set forth above does not constitute a substantial transformation. The imported ratchet handles, socket forgings and the flat wrench forgings establish the essential character of the finished tool and do not undergo a substantial transformation and, therefore, the finished sockets and flat wrenches are not excepted from country of origin marking and must be marked with the country of origin of the forgings. Consistent with this ruling, the following rulings, C.S.D. 89–121 (July25, 1989) (HRL 731572 (July 1, 1989)); T.D. 74–12(3) (November 1, 1973); and HRLs 733196 (August 10, 1990), 733579 (August 20, 1990), 732259 (February 16, 1989), 711320 (March 6, 1981), 721462 (March 17, 1981), 717662 (October 25, 1991), 723271 (February 2, 1984), 724270 (January 16, 1984), 721562 (October 17, 1983), 718711 (July 30, 1982); and any other rulings inconsistent with this ruling and *National Hand Tool Corp. v. United States, supra*, are hereby modified.

The wrench forgings imported from, and manufactured in, Mexico also do not become a good of the U.S. under the NAFTA Marking Rules as a result of the U.S. processing and, therefore, are not excepted from marking.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF MESH SLEEP SCREENS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of mesh sleep screens. Comments regarding the proposed action are invited.

DATE: Comments must be received on or before February 10, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Office of Regulations and Rulings, Textile Classification ranch (202–482–7014).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of mesh sleep screens. Comments on the proposed action are invited.

In New York Ruling Letter (NYRL) 835207, issued January 11, 1989, Customs classified three styles of sleep screens made of sheer knit nylon fabric (mesh) in subheading 6307.90.9030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which then provided for other made up articles of textile materials (6307.90.9989 in the current tariff). This ruling is set forth as "Attachment A" to this document.

After review of the matter, it is Customs position that the sleep screens are principally shelters that provide a protective enclosure for campers sleeping outdoors in sleeping bags, cots, and the like. As such, they are tent-like structures classifiable in subheading 6306.22.9010,

HTSUSA. Customs intends to revoke NYRL 835207 to reflect proper classification of the sleep screens under this subheading. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter revoking NYRL 835207 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: December 21, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, January 11, 1989.

CLA–2–63:S:N:N3G:345 835207
Category: Classification
Tariff No. 6307.90.9030

MR. LAWRENCE EPPENBACH
EPCO DESIGN
900 First Avenue South #303
Seattle, WA 98134

Re: The tariff classification of "SleepScreen Products" from South Korea.

DEAR MR. EPPENBACH:

In your letter dated December 21, 1988, you requested a tariff classification ruling. Descriptive literature of the following were submitted:

"SleepScreen," size: 34″ on a side × 24″ high
"SleepScreen II," size. 55″ wide × 28″ high
"TropicScreen," size: 93″ × 54″× 36″ high

All of the above are constructed of a sheer knit nylon fabric. They are designed to be used over sleeping bags, bed or cot for protection against insects. The articles are imported with fiberglass poles and a woven nylon stuff sack with a braided drawstring closure.

The applicable HTS subheading for the above articles will be 6307.90.9030, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up articles of textile materials. The rate of duty will be 7 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents are filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

Category: Classification
Tariff No. 6306.22.9010

LAWRENCE EPPENBACH
EPCO DESIGN
119 Seward Street
Juneau, AK 99801

Re: Revocation of NYRL 835207; classification of a sleep screen; SleepScreen; TropicScreen; tent versus other made up textile article; screen house; mosquito nets.

DEAR MR. EPPENBACH:

Recently, Customs has had occasion to review New York Ruling Letter (NYRL) 835207, issued to you on January 11, 1989. We have received your submission of September 15, 1994, and reviewed all pertinent information. Our decision to revoke NYRL 835207 is set forth below.

Facts:

In NYRL 835207, Customs classified the "SleepScreen," "SleepsScreen II," and "TropicScreen." These are enclosures made of sheer knit nylon fabric, a fabric commonly referred to as screen or screening. The "SleepScreen" measures 34 inches × 34 inches × 24 inches high. "Sleepscreen II" measures 34 inches × 55 inches × 28 inches high. "TropicScreen" measures 93 inches × 55 inches × 36 inches high.

The advertising material for these products (occasionally hereafter referred to as sleep screens or screens) shows the "Sleepscreen" enclosing a man sleeping on the ground inside a single sleeping bag. The highest point of the "SleepScreen" is positioned over the man's head, forming a bubble-like enclosure that surrounds the sleeping figure. One of the four sides tapers to a point near the foot end of the sleeping bag. The enclosure stays erect by means of fiberglass poles. When not in use, the "SleepScreen" folds into the size of a folding umbrella. The "SleepScreen II" is a larger version of the "SleepScreen". The advertising shows two people sleeping on the ground in separate sleeping bags under the screen. The "TropicScreen" is shown as a larger structure, enclosing a person sleeping on a cot. The poles form an enclosure that extends over the entire length of the cot, with some room to spare on all sides around the cot. None of the foregoing sleep screens have a floor; entry is made by lifting the screen. All these screens fold up and fit into nylon carry bags. The New York ruling classified these screens in subheading 6307.90.9030, HTSUSA, which then provided for other made up articles of textile materials (now 6307.90.9989 in the current tariff).

You indicated that with a shipment in April of 1994, the "Tropicscreen II" was imported for the first time. This product is identical to the "TropicScreen," except for the added features of a coated nylon floor and a zipper entry. The matter of proper classification for all the screens was raised again. A Notice of Action (CF 29) was issued on July 1, 1994, with respect to an entry dated April 4, 1994. The notice stated that sleep screens and tropic screens are considered screen house tents classifiable in subheading 6306.22.9010, HTSUSA. The sleep screens covered by the entry eventually were liquidated as entered in subheading 6307.90.9030, HTSUSA, by authority of NYRL 835207, but revocation of that ruling was recommended by the National Import Specialist (NIS) Division of our New York Seaport Area office. You have submitted your arguments contending that the screens at issue should remain classifiable under heading 6307, HTSUSA.

Issue:

Are the sleep screen and tropic screen products at issue classifiable under heading 6306, HTSUSA, pertaining to tents or under heading 6307, HTSUSA, pertaining to other made up articles of textile materials?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation (GRI) GRI 1 provides that classification is determined in accordance with the terms of the headings and any relative section or chap-

ter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining rules will be applied in sequential order. The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System (cited as HCDCS) assist us in the classification of merchandise. The EN's constitute the official interpretation of the nomenclature at the international level. While not legally binding, they represent the considered views of classification experts of the Harmonized System Committee. It has been the practice of the Customs Service to follow, whenever possible, the terms of the EN's when interpreting the HTSUS. (See Treasury Decision (T.D.) 89–80 and No. and *Totes, Inc. v. United States*, 91–09–00714, Slip op. 92–153 (CIT September 4, 1992), 26 Cust. Bull. No. 40, 35, 37 n. 3 (September 30, 1992), concerning the EN's and citing T.D. 89–80.)

If the screens are classifiable under GRI 1 as a kind of tent under heading 6306, HTSUSA, heading 6307, HTSUSA, will be inapplicable, since it applies only to articles not more specifically covered in other headings. Therefore, the first question is whether the screens are indeed classifiable in heading 6306, HTSUSA, as the NIS Division recommends.

Heading 6306 provides for the following articles: Tarpaulins, awnings and sunblinds; **tents;** sails for boats, sailboards or landcraft; camping goods. The EN's for heading 6306, HTSUSA, provide the following pertaining to tents (HCDCS, Vol 2, p. 867.):

> Tents are shelters made of lightweight to fairly heavy fabrics of man-made fibres, cotton or blended textile materials, whether or not coated, covered or laminated, or of canvas. They usually have a single or double roof and sides or walls (single or double), which permit the formation of an enclosure. The heading covers tents of various sizes and shapes, e.g., marquees and tents for military, camping (including backpack tents), circus, beach use. They are classified in this heading, whether or not they are presented complete with their tent poles, tent pegs, guy ropes or other accessories.
>
> Caravan "awnings" (sometimes known as caravan annexes) which are tent-like structures are also regarded as tents. They are generally made of man-made fibre fabrics or of fairly thick canvas. They consist of three walls and a roof and are designed to augment the living space provided by a caravan.

The above EN description of tents is broad. They are first described as shelters, which is a broad, encompassing term. They are next described as enclosures (usually (*but not necessarily*) having a roof and sides), also a broad, encompassing term. In addition, the EN includes "tent-like" structures within the meaning of "tents." All of this means that the term "tents," for tariff purposes, is not to be interpreted restrictively and includes structures that are like or similar to ordinary tents.

Customs has interpreted the term "tents" to include a variety of articles, consistent with the above EN description. In Headquarters Ruling Letter (HRL) 083789 (issued March 31, 1989), we classified a screen house as a tent in subheading 6306.22.9000, HTSUSA. Its sides consisted of mesh screening; it had a roof but did not have a floor. See also 083683 (March 30, 1989), 084128 (July 14, 1989) (screen house with floor), and 084770 (September 29, 1989), regarding screen houses. Also classified within the meaning of tent-like structures are cabanas and canopies. In HRL 089237 (May 10, 1991), Customs classified a beach cabana as a tent in subheading 6306.22.9030, HTSUSA. The ruling held that such cabanas are similar to tents and fall within the dictionary definition of tent as follows: a "portable shelter * * * stretched over a supporting framework of poles with ropes and pegs." (Webster's II New Riverside University Dictionary, p. 1193 (1984).) In HRL 951774 (May 28, 1992), a beach shelter with two mesh sides was held to be "of a class or kind of merchandise similar to a tent or tent-like structure." In HRL 953170 (February 10, 1993), concerning a small cabana for a pet, it was stated that tents (and tent-like structures) are shelters made of textile materials that form an enclosure. In HRL 087562 (August 15, 1990), Customs classified a canopy without sides, consisting of a roof and four poles, as a tent-like structure. The ruling found the canopy to be similar to a marquee, which is explicitly identified as a tent in the EN. It also referred to the dictionary definition of "tent" as a "portable shelter" that is stretched over a framework of poles. Generally, structures with or without floors or walls are classified as tents in the heading, as are structures that range in size from very large to very small.

Based on the foregoing, we conclude that the sleep screens at issue are prima facie classifiable as tents under heading 6306, HTSUSA, because they are shelters made of textile materials that form a protective enclosure and, therefore, fall within the class or kind of merchandise considered tent-like structures.

As stated, the NIS Division has recommended that the instant screens be classified as screen houses in the subheading explicitly applicable to such articles: 6307.22.9010,

HTSUSA. (The above cited 19S9 rulings on screen houses preceded the inception of the screen house subheading breakout.) You contend that the screens are not screen houses because they do not have a roof and thus do not offer any protection from the weather: the sun, wind, rain. The screen houses classified in the rulings cited above had roofs that provided protection from these elements. We view this distinction as unpersuasive; it flies in the face of the generally inclusive nature of the tariff term "tents." Further, it does not account for the legitimate purpose of the screen houses to offer protection from insects. We believe that protection from insects falls within the general concept of protection from the "elements," elements in this context meaning the conditions of a given local environment from which one would reasonably desire protection. Protection from insects is the very singular purpose of the mesh screening material used in screen houses, regular tents (to a limited extent, such as for doors, windows, and vents), and the sleep screens at issue here.

Since protection from insects is the purpose of the sleep screens, classification as mosquito nets is briefly suggested. However, an examination of the articles provided for in heading 6304, HTSUSA, (which, according to the pertinent EN, includes mosquito nets) shows that these are articles, predominantly knitted, crocheted, or hand-loomed, for use in association with indoor furnishings, such as bedspreads and wall hangings. The EN provides that the articles of this heading are "for use in the home, public buildings, theatres, churches, etc., and * * * in ships, railway carriages, aircraft, trailer caravans, motor-cars, etc." *(See* HCDCS, Vol. 2, p. 865.) While you have asserted that the sleep screens are used indoors as well as outdoors, we believe that such screens are principally used outdoors for camping and like activities, whether in the wild or the park, beach, porch, backyard, etc. While the screens might be useful indoors in some situations, we believe that this is not their principal function. Further, the advertising suggests outdoor use: the screens are pictured outdoors with sleeping bags and cots, and the placement of ads in the camping section of a catalogue, with tents and other outdoor/camping paraphernalia, is indicative of their principal function. Consequently, heading 6304, HTSUSA, is not applicable.

Heading 6307, HTSUSA, provides for made up textile articles not more specifically provided for elsewhere in Section XI or other chapters of the tariff. It is a residual heading that provides for a wide variety of articles, such as, but not limited to, dress patterns, dishcloths, dusters, polishing cloths, wall banners, cotton and other towels, comforter shells, and flags. In our view, this heading does not provide for the sleep screens at issue; these articles are more specifically described in heading 6306, HTSUSA.

We believe that the instant sleep screens are sufficiently similar to screen houses to warrant their classification in subheading 6307.22.9010, HTSUSA. As above, the absence of an impervious roof is not disqualifying, given that the sleep screens are nonetheless shelters made of textile materials that form an enclosure for the purpose of providing protection from the elements, specifically the element of local, primarily airborne insects in an outdoor camping environment. All the screens have four sides and a top or peak constructed of mesh screening and poles. Thus, they are enclosures and shelters that provide protection to those enclosed inside. That the "SleepScreen" and "SleepScreen II" have one side that tapers to the foot end of the sleeping bag is not disqualifying, nor is the fact that, with respect to the foregoing sleep screens and the "TropicScreen", there is no floor or door.

Holding:

The "SleepScreen," "SleepScreen II," "TropicScreen," and "TropicScreen II" are classifiable as screen house tents in subheading 6306.22.9010, HTSUSA. The applicable duty rate is 10% *ad valorem*.

Accordingly, NYRL 835207 is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

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Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–197)

PUBLIC VERSION

USINOR SACILOR, SOLLAC, AND GTS, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND INLAND STEEL INDUSTRIES, INC., AK STEEL CORP., BETHLEHEM STEEL CORP, GENEVA STEEL, GULF STATES STEEL INC. OF ALABAMA, LACLEDE STEEL CO., LTV STEEL CO., INC., NATIONAL STEEL CORP., SHARON STEEL CORP, U.S. STEEL GROUP, A UNIT OF USX CORP., AND WCI STEEL, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 93–09–00592–AD

[Commerce's final determination of sales at LTFV remanded.]

(Decided December 19, 1994)

Weil, Gotshal & Manges (A. Paul Victor, Martin S. Applebaum, and *Scott Maberry)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis),* Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Stephen J. Powell* and *Terrence J. McCartin),* of counsel, for defendant.

Dewey Ballantine (Alan Wm. Wolff and *Michael H. Stein)* for defendant-intervenors.

Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer and *John J. Mangan)* for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* Plaintiffs in this consolidated action, Usinor Sacilor and its subsidiaries, Sollac and GTS (collectively "Usinor"), move for Judgment Upon an Agency Record pursuant to USCIT R. 56.2, challenging certain aspects of the final determinations of sales at less than fair value by the Department of Commerce in *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From France,* 58 Fed. Reg. 37,125 (Dep't Comm. 1993), *amended by* 58 Fed. Reg. 44,169 (Dep't Comm. 1993). The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

BACKGROUND

On June 30, 1992, the United States steel industry filed antidumping duty petitions seeking over 40 investigations of various types of steel

products from 20 countries, including France. For the French investigations, Commerce named Usinor Sacilor as a mandatory respondent. Usinor Sacilor is a French holding company owning virtually every steel company in France, and its subsidiaries, Sollac and GTS, produced virtually all of the merchandise investigated.

The investigations covered four separate classes of merchandise: hot-rolled carbon steel flat products (hot-rolled steel), cold-rolled carbon steel flat products (cold-rolled steel), corrosion-resistant carbon steel flat products (corrosion-resistant steel), and cut-to-length carbon steel plate (steel plate). The period of investigation (POI) was from January 1, 1992 through June 30, 1992.

In the final determinations, Commerce found dumping margins for all four classes of merchandise sold by Usinor, based on the differences between Foreign Market Value (FMV) and United States Price (USP). The amended final determinations resulted in the weighted-average dumping margins of 80.56% *ad valorem* for hot-rolled steel, 78.68% for cold-rolled steel, 39.40% for corrosion-resistant steel, and 52.76% for steel plate. *Amended Determination,* 58 Fed. Reg. at 44,169.

The issues presented in this action include: (1) whether Commerce properly used the arm's length test in determining if home market sales from Usinor to its related steel service centers should be included in the calculation of FMV; (2) whether it was proper for Commerce to reject Usinor's data for home market downstream sales from its related secondary steel centers to their unrelated customers, and if so, whether Commerce's choice of BIA was reasonable; (3) whether it was proper for Commerce to reject Usinor's revised B–2 product concordance; and (4) whether Commerce properly determined that Usinor miscoded hot-rolled steel product grade E–24.

DISCUSSION

This court must uphold Commerce's final determination in an anti-dumping investigation unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). It "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted).

1. *The Arm's Length Test:*

In calculating FMV, Commerce normally uses prices for home market sales, as defined in 19 U.S.C. § 1677b(a) (1988), but excludes sales to related parties—because such sales are subject to manipulation—unless the sales were made at arm's length, i.e., that the prices are "comparable" to the prices of sales made to unrelated parties. *See* 19 C.F.R.

§ 353.45(a) (1994). The arm's length test Commerce used in all the flat-rolled steel investigations is set out in *Appendix II. A., Issues Common to All Antidumping Investigations of Flat-Rolled Steel Products,* to *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Argentina,* 58 Fed. Reg. 7066, 7069 (Dep't Comm. 1993), and *Appendix II. A., Issues Common to All Antidumping Investigations of Flat-Rolled Steel Products,* to *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Argentina,* 58 Fed. Reg. 37,062, 37,077 (Dep't Comm. 1993). Pursuant to this test, for each related customer, Commerce compared, on a product-by-product basis, the weighted average price of total sales from the respondent to the related customer with the weighted average price of total sales from the respondent directly to unrelated customers. If the customer-specific price ratio of related-party versus unrelated-party sales was greater than or equal to 99.5%, all sales to that related customer were determined to be at arm's length. *Certain Cold-Rolled Carbon Steel Flat Products From Argentina,* 58 Fed. Reg. at 7069. Conversely, if the price ratio of related-party versus unrelated-party sales was less than 99.5%, all sales to that related customer were considered not at arm's length because, "on average, that customer was paying less than unrelated customers for the same merchandise." *Id.* Commerce excluded from its calculation of foreign market value **"all** sales to any related customer" that were determined not to be at arm's length. *Id.*

Responding to the comments from the parties, Commerce modified the arm's length test to take into account the effect on prices that different levels of trade may have, as prices to end-users are generally higher than prices to distributors. 58 Fed. Reg. at 37,077. Commerce, however, did not adopt Usinor's proposal that the arm's length test should incorporate the quantity of sales in its calculation. Usinor contended that price differences may result when related party sales made in certain quantities are compared to unrelated party sales made in different quantities. Commerce explained:

> We agree that Usinor has highlighted a method for fine-tuning our arm's-length test * * *. Adopting Usinor's proposal, however, would require us to identify quantity ranges within which quantities are "comparable." Given the failure of Usinor or other parties to provide factual information on this subject, this would be a highly subjective task that neither petitioners nor respondents could comment on at this point in our investigations. Moreover, * * * we believe that consideration of level of trade could address Usinor's concern to the extent that different quantities are associated with different levels of trade.

Id.

Usinor's home market sales to its related secondary steel centers ranged from [ ] percent to [ ] percent of its total home market sales during the POI for the different classes or kinds of merchandise. (Conf. Doc. 11, Letter from Counsel for Usinor to Commerce, Sept. 1, 1992, at

4.) Applying the arm's length test, Commerce found that many of these sales were not at arm's length.

Usinor contends that Commerce's arm's length test is flawed because it did not take into account differences in quantities of sales and a statistical variance. To demonstrate the methodological flaws of Commerce's test, Usinor engages in a statistical analysis of hypothetical situations. According to Usinor, Commerce should have used Usinor's methodology, prepared by a statistician in a study of related and unrelated sales in the home market.

Under the applicable statute and regulations, Commerce has considerable discretion in deciding whether to include related party sales for the calculation of foreign market value The statute merely states that the prices of sales to a related party "may be used in determining foreign market value." 19 U.S.C. § 1677b(a)(3). According to Commerce's implementing regulation:

> If a producer or reseller sold such or similar merchandise to a person related as described in [19 U.S.C. § 1677(13)], the Secretary ordinarily will calculate foreign market value based on that sale *only if satisfied* that the price is comparable to the price at which the producer or reseller sold such or similar merchandise to a person not related to the seller.

19 C.F.R. § 353.45(a) (emphasis added).

The court "must accord substantial weight to an agency's interpretation of a statute it administers. Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable.'" *American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citations omitted). Thus, the court will uphold Commerce's arm's length test unless the test is shown to be unreasonable.

Usinor has failed to demonstrate that application of Commerce's test resulted in actual distortion of price comparability. Usinor is unable to point to any record evidence showing that its products were sold at different prices for different quantities, or that Commerce actually compared Usinor's sales to related parties in larger quantities and at lower prices, with its sales to unrelated parties in smaller quantities and at higher prices. Although Usinor had quantity discount price lists for various products, the record shows that the actual sales prices were determined by Usinor's negotiation with individual customers, and not based solely on quantity levels. *See* (Conf. Doc. 12, Usinor's Questionnaire Response to Section A, at 6) (noting "[t]here is no policy of pricing by customer category nor is there any standard policy governing the use of discounts, allowances, rebates, or other price reductions. Also, terms of sale vary by customer."); (Conf. Doc. 24, Usinor's Questionnaire Response to Sections B, C, D, and E, at B–18); (Conf. Doc. 36, Usinor's Corrected Supplemental Questionnaire Response, at 13.) Given the lack

of evidence showing any distortion of price comparability, the court finds the application of Commerce arm's length test reasonable.

2. *Rejection of Downstream Sales Data in Calculating FMV:*

During the investigations, Commerce requested Usinor to report all of its home market sales for calculation of foreign market value, including sales through its related secondary steel centers to unrelated customers in France. (Pub. Doc. 50, Antidumping Duty Questionnaire, at B–4, Q. 1.) Usinor holds majority interests in secondary [ ] steel centers and minority interests in [ ] others. (Conf. Doc. 24, Usinor's Questionnaire Response to Sections B, C, D, and E, at B–3 n.2)

Usinor initially advised Commerce that it was not possible to report accurate information on downstream sales. This was due to a number of factors, including the large number of sales involved, the lack of a centralized data base for the secondary steel centers, the differences in record maintenance, and the time constraints. Usinor also emphasized the difficulties involved in tracing the country of origin of the merchandise sold by the secondary steel centers. According to Usinor, sales by the secondary steel centers to unrelated customers included sales of non-French merchandise which the centers were unable to segregate from sales of French merchandise.

Further, according to Usinor, under French law it could not compel the secondary steel centers in which it held a minority interest to provide the data requested. In any case, Usinor claimed, the downstream sales did not have identical or most similar matches to its U.S. sales.[1] Due to these factors, Commerce and Usinor reached an agreement permitting Usinor to provide limited reporting.

Pursuant to the agreement, Commerce allowed Usinor to provide sales information regarding limited product characteristics for all home market sales of the three largest resellers [ ]. Under this arrangement, Commerce would receive sales information for [ ] of related sales of hot-rolled products, [ ] of cold-rolled products, and [ ] of corrosion-resistant steel. Usinor was also required to report total volume and value of merchandise for the other majority-owned centers not reporting information, to list invoices for all sales made during the period of investigation, and to provide limited information for randomly selected invoices from those lists. Finally, Usinor had to demonstrate it did not have control over the centers in which it held a minority interest. This limited reporting arrangement, however, failed to address the inability of the secondary steel centers to identify the source of the steel they processed and/or resold.

Commerce expressly conditioned limited reporting of downstream sales on the lack of "identical or * * * most similar match[s] to the U.S.

[1] Usinor's representation did not extend to cut-to length carbon steel plate since the U.S. sales of these products all had identical matches of French merchandise sold to unrelated purchasers in France. (Conf. Doc. 24, Usinor's Questionnaire Response to Sections B, C, D, and E at B–4.)

products sold *in all cases* * * *." (Pub. Doc. 87, Letter from Commerce to Counsel for Usinor, Oct. 14, 1992, at 1.) Commerce warned, however, that if, upon review, Commerce determines that any of the downstream sales "would have been selected as the most appropriate match to the U.S. product, the Department may use best information available for its determination." *Id.* at 1–2. Commerce required all information to be submitted by December 2, 1992. (Pub. Doc. 132, Letter from Commerce to Counsel for Usinor, Nov. 25, 1992, at 1.)

On November 24, 1992, Usinor submitted the bulk of the required invoices, and on December 2, 1992, provided the remainder of the invoices and reported its home market sales by its related secondary steel centers per Commerce's instructions. Usinor discovered, however, upon reviewing its submission, that there were some product matches for the three largest centers for home-market sales with products sold in the United States.

Commerce established December 21, 1992, as the deadline for submission of information to remedy deficiencies in the questionnaire responses. On that date Usinor reported sales data for [ ] of the majority-owned secondary steel centers. The information supplied covered the vast majority of the sales by the centers: [ ] of hot-rolled products; [ ] of cold-rolled products; and [ ] of corrosion-resistant products. (Pls.' Conf. Mem. Supp. J. Agcy. R. at 13). The remaining [ ] of the majority-owned centers, which only constituted [ ] of hot-rolled sales, [ ] of cold-rolled sales, and [ ] of corrosion-resistant sales, did not have any product matches. *Id.* at 14. Usinor did not report data from these centers.

Commerce determined that it would not use any of the information placed on the record for Usinor's downstream sales and instead would resort to BIA. The basis for this action was Usinor's failure to meet the preconditions of the agreement. Moreover, because Commerce did not use the downstream sales information, Commerce never reached the question of whether Usinor had operational control over the secondary steel centers in which it held a minority interest. *Final Determinations*, 58 Fed. Reg. at 37,129.

(a) *Commerce's Resort to BIA:*

Usinor contends that Commerce should have used Usinor's downstream sales data, because such data covered nearly all of the downstream sales in the home market and was timely placed on the record. Usinor claims that Commerce was arbitrary in insisting upon Usinor's submission of downstream sales data and then rejecting it in its entirety. According to Usinor, it had timely supplied almost all of the data originally requested, the errors had been timely corrected, and the data was verifiable. The reason for Commerce's rejection of its data, Usinor

claims, was to punish Usinor for its misrepresentation that downstream sales did not contain appropriate matches to U.S. sales.

Whether Commerce may resort to BIA for downstream sales does not depend upon whether Usinor breached a condition for submitting the requested data. Commerce shall use BIA "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation * * *." 19 U.S.C. § 1677e(c) (1988).

The best information available is not necessarily the most accurate information; rather, it is information that has become usable due to a respondent's failure to provide accurate information. *Asociacion Colombiana de Exportadores de Flores v. United States,* 13 CIT 13, 16, 704 F. Supp. 1114, 1117 (1989) *aff'd* 8 Fed. Cir. (T) 97, 901 F.2d 1089, *cert. denied,* 498 U.S. 848 (1990).

Usinor was unable to provide accurate information. Commerce requested Usinor to report its home market sales to unrelated customers. Most of the downstream sales reported by Usinor, however, did not identify which sales involved Usinor's products, due to the inability of most of the secondary steel centers to match the supplier of the materials processed by the centers to the products sold to their customers. (Conf. Doc. 44, Usinor's Questionnaire Response to Sections A, B, and C, at 5–6.) As Usinor itself recognized, the downstream sales data it had provided was "unreliable" for this reason. *Final Determinations,* 58 Fed. Reg. at 37,128. Given Usinor's inability to provide the information requested, Commerce was reasonable in resorting to BIA.

(b) *Selection of the Highest Non-Aberrant Margin as BIA:*

Usinor next contests Commerce's choice of the highest non-aberrant margin as BIA. Commerce based its decision to reject Usinor's data on Usinor's failure to meet the preconditions for limited reporting. Commerce contended:

> [t]he fact that Usinor never 'guaranteed' that downstream sales would never be matched to U.S. sales is irrelevant. The letter to Usinor from the Department granting Usinor permission to submit less than full reporting of sales data expressly laid out the terms and conditions of such permission * * *. Usinor accepted these conditions when it made the decision to provide limited data for these sales."

Final Determinations, 58 Fed. Reg. at 37,129. Commerce further argued that Usinor's submissions were deficient due to Usinor's failure to report downstream sales from its minority-owned secondary steel centers. (Def.'s Br. at 20).

The court finds Commerce's reasoning unpersuasive. Usinor substantially met the requirements of the original and modified questionnaire requests. Usinor supplied more data than was required under the limited reporting arrangement and provided well over 99% of the data demanded by the original questionnaire. Rejection of Usinor's data solely on the basis that Usinor failed to meet a precondition of its agree-

ment with Commerce would be unreasonable. The question, therefore, is whether Commerce may use adverse BIA on the sole basis of Usinor's inability to trace the source of the steel processed by its secondary steel centers.

Commerce may not choose a BIA methodology that rejects "low margin information in favor of high margin information that was demonstrably less probative of current conditions." *Rhone Poulenc, Inc. v. United States,* 8 Fed. Cir. (T) 61, 67, 899 F.2d 1185, 1190 (1990). Commerce's selection of a severely adverse BIA is "improper when only a minor adjustment in the data is involved or there is an inadvertent gap in the record, but otherwise the respondent has substantially complied with the questionnaire, *National Steel Corp. v. United States,* 18 CIT ____, Slip Op. 94–194 (December 13, 1994) (citations omitted), or when the missing data is beyond the control of the respondent, *see Allied-Signal Aerospace Co. v. United States,* 11 Fed. Cir. (T) ____, ____, 996 F.2d 1185, 1190 (1993) (finding respondent's inability to provide necessary data did not constitute failure to cooperate mandating more adverse BIA); *Holmes Prods. Corp. v. United States*, 16 CIT 628, 629–31, 795 F. Supp. 1205, 1206–07 (1992) (requiring Commerce to use respondent's data as respondent had substantially complied with Commerce's requests and could not control conduct of uncooperative affiliate).

The deficiencies in Usinor's data were a result of factors outside Usinor's control. Usinor's subsidiaries did not maintain the sourcing data. Therefore, any tracing would have been done manually. (Conf. Doc. 36, Usinor's Corrected Supplemental Questionnaire Response, at 25–26.) Due to the time limitations and the large number of invoices involved (180,000), this would have been unreasonable. Given Usinor's inability to provide the data requested, selection of the highest non-aberrant margin is improper.

Further, that Usinor failed to report sales by the secondary steel centers in which it maintained a minority interest is not necessarily prejudicial, as Commerce declined to investigate whether Usinor lacked operational control. Commerce may resort to BIA, however, if Usinor inaccurately represented that it has no such control.

To resolve this issue, the court directs Commerce to determine whether Usinor had operational control over the secondary steel centers in which it held a minority interest. If Commerce finds that Usinor did not have operational control, Commerce is directed to select the weighted average calculated margin as BIA. If Commerce finds Usinor maintained operational control, Commerce may reapply the highest non-aberrant margin as BIA in a manner consistent with this court's decision in *National Steel Corp. v. United States,* 18 CIT ____, Slip Op. 94–194.

3. *Rejection of Usinor's Correction of Product Concordance:*

After the publication of the preliminary determinations and before verification, Usinor informed Commerce that it might have misunderstood Commerce's product matching instruction and placed level of

trade before physical similarity in constructing the product concordance. Usinor explained that it did not realize the problem until it reviewed Commerce's preliminary determination in *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 58 Fed. Reg. 7103 (Dep't Comm. 1993) (prelim. determ.), in which Commerce stated that one of the respondents, Nippon Steel, had incorrectly "matched sales of less similar models at the same or the most comparable level of trade rather than matching sales of more similar products at other levels of trade." *Id.* at 7105. Usinor requested Commerce to either confirm its product matching hierarchy or to accept Usinor's submission of a revised product concordance.

Commerce rejected Usinor's revised product concordance as unsolicited and untimely submitted information. *See* 19 C.F.R. § 353.31(b)(2) (1994). In its final determinations, Commerce acknowledged that Usinor's error could have been caused by confusion over the "General Instructions" on Section A of the Questionnaire. *Final Determinations*, 58 Fed. Reg. at 37,130.

> However, at the point when we discovered Usinor's error, we could not allow the correction of the errors nor can we now simply use the existing information in our margin analysis since we know that this information is incorrect. Because of *the arguable ambiguity in Section A of the questionnaire* and *the limited number of U.S. sales involved*, we have applied the weighted-average margin calculated for all other sales on a class or kind basis to sales of each U.S. product that were incorrectly matched to a home market product * * *.

Id. (emphasis added).

Commerce further explained that, because of "the large volume of cases" and "the limited time available to conduct these investigations," it had decided not to accept corrections to, nor to significantly revise on its own, the product concordances submitted prior to verification. *Id.*

Usinor contends that Commerce should have either accepted Usinor's revision, or modified the product concordance on its own, as the error was caused by Commerce's misleading instructions. Usinor further claims that the correction was not new information, but clarification of the existing information on the record. Furthermore, Usinor claims Commerce could have saved more time and effort by accepting Usinor's revised concordance before verification than by resorting to the use of weighted-average margins as best information available for the sales affected by the errors.

During an antidumping proceeding, Commerce has discretion to set time limits for the submission of a questionnaire response or other factual information requested. *See* 19 C.F.R. § 353.31(b). Because Commerce must complete the investigation within strict statutory time limits, it is imperative that the requested information be submitted "within a period that allows Commerce sufficient time for adequate analysis and comment while still meeting statutory deadlines." *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205

(1986). Thus, in general, the court has affirmed Commerce's rejection of corrections submitted after the deadline. *See e.g., Mantex, Inc. v. United States*, 17 CIT ___, ___, 841 F. Supp. 1290, 1310 (1993); *NSK Ltd. v. United States*, 16 CIT 745, 749–50, 798 F. Supp. 721, 725 (1992), *aff'd*, 11 Fed. Cir. (T) ___, 996 F.2d 1236 (1993); *Sugiyama Chain Co. v. United States*, 16 CIT 526, 533, 797 F. Supp. 989, 996 (1992).

The court, however, also has required Commerce to accept late submission of corrections where the error was "so obvious or egregious" that the failure to correct it constituted an abuse of discretion and undermined the interests of justice, *Tehnoimportexport v. United States*, 15 CIT 250, 260, 766 F. Supp. 1169, 1178 (1991), or where the errors were clerical and the limited burden of correction was "far outweighed by the preference for accuracy in final dumping determinations." *Koyo Seiko Co. v. United States,* 14 CIT 680, 683, 746 F. Supp. 1108, 1111 (1990). *See also Serampore Indus. Pvt., Ltd. v. United States Dep't of Comm.,* 12 CIT 825, 834, 696 F. Supp. 665, 673 (1988). Furthermore, the court has held that it was arbitrary for Commerce to reject a respondent's late submission where the untimeliness was of Commerce's own making. *Bowe-Passat v. United States*, 17 CIT ___, ___, Slip. Op. 93–68 (May 7, 1993) (requiring Commerce to accept party's late submission clarifying deficiencies that Commerce had been aware of but failed to disclose until too late).

Essentially, when deciding whether Commerce abused its discretion in rejecting the information submitted after the deadline, the court considers the interests of accuracy and fairness, and the burden imposed upon the agency by accepting the late submission.

In this case, the court finds the interests of accuracy and fairness outweigh the burden imposed upon the agency. The court recognizes that this investigation was among the large number of steel investigations that engaged Commerce in an unusually intensive and demanding period of work. This circumstance made it more difficult for Commerce to accept corrections submitted after the deadline. In addition, Commerce used weighted-average margins as the best information for the sales affected by the errors, which minimized the adverse effect that any inaccuracy resulted from the use of BIA might have on Usinor's final margins.

There are, however, other significant facts the court must consider. First of all, the court finds the relevant section of the questionnaire, when read by itself, could be misleading as to the priority of the product matching hierarchy. *See* (Pub. Doc. 50, Antidumping Duty Questionnaire, at A–4, Q. 4C.) Where, as here, an ambiguity in the questionnaire causes a party to make errors in its response, Commerce's obligation to remedy the situation it caused is greater than it would otherwise be.

Here, Usinor submitted its revised product concordance before verification. At the time Usinor approached Commerce with the revision, on February 17, 1993, Commerce was still seeking "clarifications" of the information previously submitted, although it specifically excluded

"new product concordances" from the scope of clarification. (Pub. Doc. 190, Letter from Commerce to Counsel for Usinor, Feb. 10, 1993, at 1.) These corrections merely sought to change the format of the data, and not what constituted the data itself. Finally, given the limited number of U.S. sales involved in the revision, *see* (Conf. Doc. 60, Letter from Counsel for Usinor to Commerce, Feb. 17, 1993), the court does not agree that acceptance of the revision would have placed an undue burden upon Commerce.

Having considered the interests of accuracy, fairness and administrative economy, the court holds that Commerce abused its discretion in rejecting Usinor's revised product concordance. Accordingly, the court remands the issue to Commerce with the instruction that Commerce accept the revised product concordance.

4. *Miscoding:*

Commerce found at verification that Usinor incorrectly assigned product codes for an entire grade of steel in both the U.S. and home markets. *Final Determinations*, 58 Fed. Reg. at 37,131. Usinor reported the product, grade E–24 hot-rolled steel, as having yield strength of one category, whereas Commerce found the product should be coded as another category having a different yield strength. Consequently, Commerce applied partial BIA to all sales involving that product. The BIA margin assigned was the higher of the average margin in the petition or the highest non-aberrant calculated margin in the investigation. *Id.* Commerce applied this adverse BIA margin because the errors were not limited in nature. *Id.*

Usinor challenges Commerce's use of BIA, claiming that it did not miscode the product. Usinor contends that although, according to the industry standard printed on the product sheet, the product should have one category of yield strength, the actual product made by Usinor had the yield strength of another category. Usinor claims it coded the product according to its actual yield strength, and that Commerce was silent in its instructions as to whether the actual yield strength or the industry standard should be used. In addition, Usinor points out that Commerce verified Usinor's coding of the product by its actual yield strength.

(a) *Whether Usinor is barred from raising the arguments:*

Defendant and defendant-intervenor contend that Usinor is barred from raising these arguments before the court because it did not raise them in a timely fashion below, and thus failed to exhaust administrative remedies as required by law.

The court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (1988). "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of dn opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1946).

The record shows Usinor argued, at the administrative level, that Commerce should not apply "punitive BIA" to sales involving "arguably incorrectly coded products." (Conf. Doc. 81, Resp't's Rebuttal Br. before ITA, at 24.) Usinor stated that its product experts decided to code grade E–24 steel as having the yield strength of that category because "most of the products *actually* produced fill [sic] within [that category] range." *Id.* at 25.

Apparently, Usinor argued at the administrative level that Commerce should not apply a punitive BIA rate because Usinor had substantially complied with Commerce's instructions. Before the court, Usinor argues that Commerce should not apply BIA at all because Usinor reported the product according to its actual yield strength, which was not inconsistent with Commerce's instructions.

While Usinor appears to have shifted its arguments, the ground upon which Usinor bases its arguments remains the same, that is, Usinor's compliance with Commerce's instructions. Because the question of whether Commerce properly resorted to BIA depends on whether Usinor complied with Commerce's information request, *see* 19 U.S.C. § 1677e(c), and because Usinor raised the issue of compliance during the administrative proceeding, the court concludes that it would not be appropriate to bar Usinor from raising its arguments before the court.

(b) *Whether Usinor complied with Commerce's instruction:*

Usinor argues that it did not miscode the product according to its actual yield strength, because Commerce did not specify whether Usinor should report the product by the industry standard or by the product's actual yield strength. The record shows that Commerce's questionnaire required Usinor to classify its hot-rolled products according to certain ranges of minimum yield strength, but did not indicate whether the classification should be by the actual quality of the product. (Pub. Doc. 50, Antidumping Duty Questionnaire, App. v. at 5.)

It is unclear whether Commerce, when drafting the questionnaire instructions, should have anticipated that the actual quality of the product may differ from the industry standard. The fact remains, however, that Commerce did not require Usinor to report the product according to the industry standard. Under the circumstances, it was not unreasonable for Usinor to report the product by its actual yield strength. Usinor's reporting of the product according to its actual yield strength was verified by Commerce. (Conf. Doc. 102, Verification Report, at 7.) Moreover, Usinor classified the product consistently for both the U.S. market and home market, and there is no suggestion that Usinor acted in bad faith.

"Before [Commerce] may find any non-compliance on the part of the parties to the proceeding, there must be a clear and adequate communication requesting the information * * *." *Daewoo Elecs. Co. v. United States*, 13 CIT 253, 266, 712 F. Supp. 931, 945 (1989), *rev'd in part on other grounds*, 11 Fed. Cir. (T) ____, 6 F.3d 1511, *cert. denied, International Union of Elec., Elec., Technical, Salaried, & Mach. Workers v.*

United States, 114 S. Ct. 2672 (1994). As Commerce did not specify the standard by which Usinor should classify the product, the court finds there was a lack of clear communication requesting the information.

Accordingly, the court remands the issue to Commerce for redetermination. Commerce may either provide Usinor with an opportunity to reclassify the product according to the industry standard, or accept the classification based on actual yield strength. If Commerce chooses the latter, it should make a further finding as to whether Usinor correctly reported all of its grade E–24 steel by the actual yield strength.

CONCLUSIONS

Commerce's final determinations are affirmed in part, and remanded in part. On remand, Commerce shall (1) determine whether Usinor had operational control over the secondary steel centers in which it maintained a minority interest and recalculate the appropriate BIA margin as directed herein after making such determination; (2) accept Usinor's revised product concordance submitted on February 17, 1993; and (3) redetermine the issue of miscoding grade E–24 steel, in accordance with the specific instruction set forth in this opinion.

The remand results shall be filed with the Court within [60] days from the date of this opinion. Any party contesting the remand results shall file comments within 30 days of the remand results. Commerce may file its response to any comments within 15 days of the filing of the comments.

(Slip Op. 94–198)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE S.A., SKF GMBH, SKF INDUSTRIE, S.P.A., SKF (U.K.) LTD. AND SKF SVERIGE, AB, FAG KUGELFISCHER GEORG SCHAFER KGAA, FAG CUSCINETTI S.P.A., FAG (UK) LTD., BARDEN CORP. (UK) LTD., FAG BEARINGS CORP., THE BARDEN CORP., BARDEN PRECISION BEARINGS CORP., RHP BEARINGS RHP BEARINGS INC., PEER BEARING CO., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., NSK CORP., SNR ROULEMENTS, NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., AND NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, DEFENDANT-INTERVENORS

Consolidated Court No. 92–06–00422

Plaintiff challenges certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") affirmative determination in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (1992). Plaintiff alleges that Commerce made various ministerial errors in its Final Results. Specifically, plaintiff claims that Commerce: (1) failed to deduct direct warranty expenses in calculating United States price ("USP") for SNR Roulements ("SNR"); (2) failed to deduct U.S. repacking costs in calculating USP for INA Walzlager Schaeffler KG ("INA"); (3) improperly calculated adjusted price for comparison with cost of produc-

tion ("COP") for SKF GmbH ("SKF-Germany"); (4) improperly calculated foreign market value ("FMV") for Showa Pillow Block Manufacturing Co., Ltd. ("Showa Pillow Block"); (5) improperly calculated constructed value for Inoue Jikuuke Kogyo Co., Ltd. ("IJK"); (6) improperly calculated exporter's sales prices for Izumoto Seiko Co., Ltd. ("Seiko"); (7) improperly calculated adjusted home market prices for comparison with COP for Nachi–Fujikoshi Corp. ("Nachi"); and (8) improperly calculated FMV for FAG (U.K.) Ltd. ("FAG U.K.").

This matter is before the Court on plaintiff's second motion for partial judgment upon the agency record pursuant to Rule 56.1 of the Rules of this Court.

Held: Plaintiff's motion is granted. This case is remanded to Commerce to: (1) deduct direct warranty expenses in calculating United States price for SNR; (2) deduct U.S. repacking costs in calculating United States price for INA; (3) determine whether it miscalculated adjusted price for SKF-Germany; (4) determine whether it miscalculated foreign market value for Showa Pillow Block; (5) determine whether it miscalculated constructed value for IJK; (6) determine whether it miscalculated exporter's sales price for Seiko; (7) determine whether it miscalculated adjusted price for Nachi; and (8) determine whether it miscalculated foreign market value for FAG U.K.

[Plaintiff's motion is granted; case remanded to Commerce.]

(Dated December 20, 1994)

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Covington & Burling (Harvey M. Applebaum, David R. Grace and *Thomas A. Robertson)* for defendant-intervenors RHP Bearings and RHP Bearings Inc.

Venable, Baetjer, Howard & Civiletti (John M. Gurley and *Lindsay B. Meyer)* for defendant-intervenor Peer Bearing Company.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis, T. George Davis and *Niall P. Meagher)* for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Lipstein, Jaffe & Lawson (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for defendant-intervenors NSK Ltd. and NSK Corporation.

Grunfeld, Desiderio, Lebowitz & Silverman (Bruce M. Mitchell, David L. Simon, Philip S. Gallas, Jeffrey S. Grimson, Andrew B. Schroth and *Matthew L. Pascocello)* for defendant-intervenor SNR Roulements.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Corporation and NTN Kugellagerfabrik (Deutschland) GmbH.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Federal-Mogul Corporation ("Federal-Mogul"), challenges the affirmative determination of the Department of Commerce, International Trade Administration ("Commerce"), in

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results"), 57 Fed.Reg. 28,360 (1992).

This action comes before the Court on plaintiff's second motion for partial judgment upon the agency record pursuant to Rule 56.1 of the Rules of this Court.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders covering the unfairly traded subject merchandise. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (1989); 54 Fed. Reg. 20,902 (1989) (France); 54 Fed. Reg. 20,903 (1989) (Italy); 54 Fed. Reg. 20,904 (1989) (Japan); 54 Fed. Reg. 20,906 (1989) (Romania); 54 Fed. Reg. 20,907 (1989) (Singapore and Sweden); 54 Fed. Reg. 20,909 (198S) (Thailand); *Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom*, Fed. Reg. 20,910 (1989); 54 Fed. Reg. 20,911 (1989) (Thailand).

On June 28, July 19 and August 14, 1991, Commerce initiated administrative reviews of these orders with respect to various manufacturers and exporters for the period May 1, 1990 through April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews*, 56 Fed. Reg. 29,618 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 33,251 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 40,305 (1991).

On March 31, 1992, Commerce published its preliminary determinations in these second administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 57 Fed. Reg. 10,859 (1992); 57 Fed. Reg. 10,862 (1992) (Federal Republic of Germany); 57 Fed. Reg. 10,865 (1992) (Italy); 57 Fed. Reg. 10,868 (1992) (Japan); 57 Fed. Reg. 10,875 (1992) (Sweden); 57 Fed. Reg. 10,878 (1992) (United Kingdom).

On June 24, 1992, Commerce published its consolidated Final Results. *Final Results*, 57 Fed. Reg. at 28,360. Amendments to the Final Results did not alter the results in any respect relevant to the issues discussed herein. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 32,969 (1992); *Antifriction Bearings (Other Than Tapered Roller*

Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews, 57 Fed. Reg. 59,080 (1992).

Against this background, Federal-Mogul now moves pursuant to Rule 56.1 of the Rules of this Court for partial judgment upon the agency record alleging that Commerce made various ministerial errors in its Final Results.[1] Specifically, Federal-Mogul claims that Commerce: (1) failed to deduct direct warranty expenses in calculating United States price ("USP") for SNR Roulements ("SNR"); (2) failed to deduct U.S. repacking costs in calculating USP for INA Walzlager Schaeffler KG ("INA"); (3) improperly calculated adjusted price for comparison with cost of production ("COP") for SKF GmbH ("SKF-Germany"); (4) improperly calculated foreign market value ("FMV") for Showa Pillow Block Manufacturing Co., Ltd. ("Showa Pillow Block"); (5) improperly calculated constructed value for Inoue Jikuuke Kogyo Co., Ltd. ("IJK"); (6) improperly calculated exporter's sales prices for Izumoto Seiko Co., Ltd. ("Seiko"); (7) improperly calculated adjusted home market prices for comparison with COP for Nachi-Fujikoshi Corp. ("Nachi"); and (8) improperly calculated FMV for FAG (U.K.) Ltd. ("FAG U.K."). *Brief of Federal-Mogul Corporation in Support of its Second Motion for Partial Judgment Upon the Agency Record ("Plaintiff's Brief")* at 1–13.

Federal-Mogul alleges that due to the above-enumerated ministerial errors, Commerce's Final Results are unsupported by substantial evidence on the record and are not otherwise in accordance with law. *Plaintiff's Brief* at 3.

DISCUSSION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

This Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

Ministerial Errors:

Federal-Mogul alleges that, due to various ministerial errors, various cash deposit rates established by the Final Results are understated.

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[1] The errors alleged pertain exclusively to ball bearings.

SNR's Direct Warranty Expenses on U.S. Sales:

Federal-Mogul first asserts that, although Commerce intended to calculate a specific percentage of the unit price to account for SNR's direct warranty expenses ("DWARRE") on U.S. sales and to deduct this amount from USP, Commerce failed to do so. Specifically, Federal-Mogul asserts that Commerce excluded DWARRE from total U.S. direct selling expenses ("USDRCT") and, consequently, also excluded DWARRE from total U.S. selling expenses ("USSELL") which were deducted from unit price in the USP calculation. Federal-Mogul seeks a remand so that Commerce may adjust its computer program to include DWARRE. *Plaintiff's Brief* at 6–7.

Commerce points out that it calculated the value for the variable DWARRE, but concedes that it inadvertently excluded DWARRE from USDRCT. Commerce concedes that, consequently, when deducting total USSELL from USP, it unintentionally neglected to also deduct direct warranty expenses. Commerce requests a remand to permit it to correct this error. *Defendant's Memorandum in Response to Plaintiff's Second Motion for Partial Judgment Upon the Agency Record ("Defendant's Brief")* at 5.

SNR objects to a remand on the ground that the error is harmless. Specifically, SNR argues that, unremedied, the error results in no discernible prejudice to Federal-Mogul, while its correction will increase Commerce's administrative costs. SNR also argues that the error results in an insignificant increase in the monetary amount of dumping duties owed and has no affect on the weighted-average dumping margin. *Non-Confidential Memorandum of Defendant-Intervenor SNR Roulements ("SNR") in Opposition to Plaintiff's Second Motion for Partial Judgment Upon the Agency Record* at 2–8.

The Court has stated that "fair and accurate determinations are fundamental to the proper administration of our dumping laws" and has recognized that "courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *Koyo Seiko Co. v. United States*, 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990); *see, e.g., Daewoo Elecs. Co. v. United States*, 13 CIT 253, 279–80, 712 F. Supp. 931, 954 (1989); *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 28, 704 F. Supp. 1114, 1126 (1989); *Serampore Indus. Pvt. Ltd. v. United States Dep't of Commerce*, 12 CIT 825, 834, 696 F. Supp. 665, 673 (1988); *Gilmore Steel Corp. v. United States*, 7 CIT 219, 223–24, 585 F. Supp. 670, 674 (1984); *Atlantic Sugar, Ltd. v. United States*, 1 CIT 211, 511 F. Supp. 819 (1981). In the case at bar, the subject error is of a type similar to computer programming errors which this Court granted Commerce leave to correct in *Federal-Mogul Corp. v. United States*, 16 CIT 975, 809 F. Supp. 105 (1992). Furthermore, where remand is otherwise necessary, it is appropriate to correct errors even though the result thereof may be insignificant. *Brother Indus., Ltd. v. United States*, 15 CIT 332, 346, 771 F. Supp. 374, 388 (1991).

This error was inadvertent and Commerce has apparently concluded that any cost which would be incurred by virtue of a remand for correction of this error is outweighed by the preference for accuracy in final dumping determinations. Accordingly, the Court remands this matter to Commerce for elimination of the error related to deduction of direct warranty expenses in the calculation of USP for SNR.

INA's U.S. Repacking Costs:

Federal-Mogul next asserts that in calculating the exporter's sales price ("ESP") variant of USP for INA, Commerce intended to deduct the cost of INA's additional packing performed in the United States ("USPACK"), but failed to do so. *Plaintiff's Brief* at 7.

Commerce concedes that, in calculating ESP for INA, it intended to deduct the cost of all packing performed *in* the United States from ESP. *Defendant's Brief* at 6 (emphasis added). Commerce explains that it calculated amounts for these expenses and included them under the variable US PACK but the computer program failed to deduct the amounts from ESP sales. *Id.* at 5–6. Commerce requests a remand to permit it to rectify this error. *Id.* at 6.

The court has often remanded cases to Commerce to correct similar inadvertent computer programming and ministerial errors. *See Daewoo Elecs. Co. v. United States*, 15 CIT 124, 133–34, 760 F. Supp. 200, 208 (1991), *modified*, 6 F.3d 1511 (1993); *Serampore Indus.*, 12 CIT at 834, 696 F. Supp. at 673. Therefore, the Court remands to Commerce for correction of the error relating to U.S. repacking costs in the calculation of USP for INA.

SKF-Germany's Adjusted Price:

Federal-Mogul also contends that Commerce failed to make certain deductions in calculating adjusted price ("ADJPRICE") for SKF GmbH ("SKF-Germany"), an affiliate of SKF USA Inc., SKF France S.A., SKF Industrie, S.p.A., SKF (U.K.) Ltd. and SKF Sverige AB, (collectively "SKF"), before comparing it with COP when testing for sales made at prices below COP. Specifically, Federal-Mogul asserts that Commerce failed to deduct domestic pre-sale freight ("DPRSFR1H" and "DPRSFR2H") and inland freight ("DINLFRH") expenses. *Plaintiff's Brief* at 8. Federal-Mogul points out that Commerce made these deductions in calculating ADJPRICE for four SKF affiliates. *Id.*

Commerce resists Federal-Mogul's motion with regard to SKF-Germany on the ground that Federal-Mogul never raised this issue during the underlying review and is, therefore, precluded from raising this issue for the first time before the Court. *Defendant's Brief* at 8–9. However, in the event that the Court does not require Federal-Mogul to exhaust its administrative remedies in this instance, Commerce requests a remand to permit it to evaluate the merits of Federal-Mogul's allegation. *Id.* at 9.

SKF also opposes this part of Federal-Mogul's motion on the ground that SKF-Germany included freight expenses in its COP data and, therefore, Commerce was correct to exclude freight expenses from ADJ-

PRICE in performing the below-cost test. *Opposition Brief of SKF USA Inc., SKF France, S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Ltd. and SKF Sverige AB to Federal-Mogul Corporation's Second Motion for Partial Judgment Upon the Agency Record* at 3–5.

In the context of comparison of prices with COP with respect to SKF-Germany, the Final Results explicitly state that "[m]ovement expenses are appropriately deducted from the price consistent with Department practice." *Final Results*, 57 Fed. Reg. at 28,416. As illustrated above, the Court is loathe to affirm a determination that is based on a questionable record. On occasion, the court has exercised its discretion and remanded to Commerce although an alleged ministerial error was not raised in the underlying proceeding. *Serampore Industries*, 12 CIT at 834, 696 F. Supp. at 673. Because this action is being remanded to Commerce for correction of errors relating to SNR and INA and because Commerce has indicated, in the alternative, that a remand is acceptable, this part of the action is remanded, as a matter of the Court's discretion, for Commerce to determine whether it miscalculated SKF-Germany's ADJ-PRICE in light of its stated policy regarding movement expenses. If Commerce agrees that there is a ministerial error in its computer programming instructions, Commerce is directed to make the appropriate correction.

Calculation of Showa Pillow Block's Foreign Market Value:

Federal-Mogul further asserts that Commerce intended to add United States export inspection fees to Showa Pillow Block's foreign market value, but failed to do so. Federal-Mogul contends that, as Commerce's computer program excluded inspection fees in calculating United States direct expenses, these expenses are unaccounted for. *Plaintiff's Brief* at 11–12.

Commerce protests Federal-Mogul's attempt to raise this matter before the Court, arguing that Federal-Mogul had ample opportunity to discern and contest the alleged error in the underlying administrative review but failed to do so. In support, Commerce first argues that "Commerce expressed its intent in the preliminary results to add United States export inspection fees to Showa Pillow Block's foreign market value." *Defendant's Brief* at 15. Second, Commerce argues that the alleged error in the final computer program appears also on the corresponding line of Showa Pillow Block's preliminary program. *Id.* at 14–15. Commerce requests a remand in order to consider Federal-Mogul's argument if the Court determines that Federal-Mogul did not fail to exhaust its administrative remedies. *Id.* at 15–16.

Commerce's argument concedes that it intended to add United States export inspection fees to Showa Pillow Block's FMV. As this case is being remanded for various other corrections and because Commerce is receptive to remand, this part of the action is remanded at the Court's discretion for Commerce to determine whether it miscalculated Showa Pillow Block's FMV by inadvertently omitting U.S. export inspection fees. *See Daewoo Elecs.*, 15 CIT at 133, 760 F. Supp. at 208; *Serampore Indus.*,

12 CIT at 834, 696 F. Supp at 673. If Commerce discovers that there is an inadvertent ministerial error in its computer programming instructions, Commerce is directed to make the appropriate correction.

IJK's Constructed Value, Seiko's Exporter's Sales Price, Nachi's Adjusted Price, and FAG U.K.'s Foreign Market Value:

Federal-Mogul contends that, in calculating constructed value for IJK, Commerce erroneously deducted interest expense. *Plaintiff's Brief* at 9.

Federal-Mogul further asserts that Commerce improperly calculated exporter's sales price ("ESP") for Seiko. *Plaintiff's Brief* at 10. Specifically, Federal-Mogul argues that Commerce's computer program for Seiko should have deducted all known cost and expense elements from unit price in calculating entered value for ESP sales. *Id.* at 10–11.

Federal-Mogul also argues that Commerce's computer program improperly calculated Nachi's adjusted home market prices for comparison with COP for purposes of testing for sales made at prices below cost of production. *Plaintiff's Brief* at 11. Specifically, Federal-Mogul contends that Commerce erroneously discarded rebates to related parties before aggregating total rebates to be deducted in the calculation of adjusted price and, in preparing to calculate ADJPRICE, erroneously set rebates to zero where they exceeded unit price. *Id.*

Lastly, Federal-Mogul argues that Commerce improperly calculated FAG U.K.'s foreign market value. *Plaintiff's Brief* at 12. Specifically, Federal-Mogul contends that, for purposes of calculating FMVs to be compared to ESP sales, Commerce inappropriately added U.S. repacking costs. *Id.* Federal-Mogul proposes that it is home market packing expenses incurred in preparing the subject merchandise for shipment to the United States which should have been added, as is required by 19 U.S.C. § 1677b(a)(1) (1988). *Id.*

Commerce argues that Federal-Mogul failed to contest the calculation of IJK's constructed value, Seiko's exporter's sales price, Nachi's adjusted price and FAG U.K.'s foreign market value during the administrative review and, therefore, Federal-Mogul should be precluded from raising these issues for the first time before the Court. *Defendant's Brief* at 9–14, 16–17. With respect to Seiko, Commerce also argues that Seiko's preliminary determination analysis memo noted that only ocean freight and marine insurance would be deducted from unit prices. *Id.* at 11.

Commerce further maintains that, after issuance of the preliminary results, Federal-Mogul was on complete notice regarding the computer instructions applicable in the contested calculations because computer instructions identical to those employed in the Final Results existed on the corresponding lines of the preliminary computer programs for IJK, Seiko, Nachi and FAG U.K. *Id.* at 9–14, 16–17. Nevertheless, Commerce requests a remand to consider the merits of Federal-Mogul's arguments if the Court determines that Federal-Mogul did not fail to exhaust its administrative remedies with respect to these issues. *Id.*

Federal-Mogul argues that it would not be reasonable for Commerce to intentionally program computer instructions which would result in these errors and, therefore, the errors are ministerial. *Federal-Mogul Corporation's Reply to the Responses to Federal-Mogul Corporation's Second Motion for Partial Judgment Upon the Agency Record* at 7–8.

A failure to enforce the exhaustion of administrative remedies principle could lead to "frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency by encouraging people to ignore [administrative] procedures." *McKart v. United States*, 395 U.S. 185, 195 (1969). However, the Court finds that the facts of this case warrant disregard of the strict application of the exhaustion of administrative remedies doctrine.

As stated above, it is axiomatic that the fair and accurate determination of dumping margins is fundamental to the proper administration of our dumping laws and the correction of clerical errors is uniformly authorized where errors would affect the accuracy of determinations. *Koyo Seiko*, 14 CIT at 682, 746 F. Supp. at 1110. In the case at bar, at no time has Commerce disputed Federal-Mogul's allegations that the alleged errors are purely clerical and would not require further examination of the facts, or that their correction would significantly reduce the dumping margins of IJK, Seiko, Nachi or FAG U.K. Therefore, the Court finds that the limited burden which would be imposed on Commerce by virtue of a remand is outweighed by the preference for accurate and meaningful final determinations. It would be inappropriate for inadvertent errors which initially evade detection to be allowed to remain unremedied for procedural reasons. *Cf. Gilmore Steel*, 7 CIT at 223–24, 585 F. Supp. at 674.

As Commerce has indicated that a remand is acceptable, the Court remands this case to Commerce to permit it to determine whether it: erroneously deducted interest expense in the calculation of constructed value for IJK; improperly calculated exporter's sales price for Seiko by failing to deduct all known cost and expense elements from unit price in calculating entered value for ESP sales; improperly handled rebates in calculating Nachi's adjusted home price for comparison with COP for purposes of testing for sales made at prices below COP; and, whether it improperly calculated foreign market value for FAG U.K. by erroneously adding U.S. repacking costs instead of home market packing costs. If Commerce agrees that there are ministerial errors in its computerinstructions with regard to these calculations, Commerce is directed to make the appropriate corrections.

CONCLUSION

In accordance with the foregoing opinion, plaintiff's second motion for judgment on the agency record is granted and this case is remanded to Commerce to: (1) deduct direct warranty expenses in calculating United States price for SNR; (2) deduct U.S. repacking costs in calculating United States price for INA; (3) determine whether it miscalculated adjusted price for comparison with COP for SKF-Germany by inadver-

tently failing to deduct domestic pre-sale freight and inland freight expenses; (4) determine whether it miscalculated foreign market value for Showa Pillow Block by inadvertently omitting U.S. export inspection fees; (5) determine whether it erroneously deducted interest expense in the calculation of constructed value for IJK; (6) determine whether it improperly calculated exporter's sales price for Seiko by failing to deduct all known cost and expense elements from unit price in calculating entered value for ESP sales; (7) determine whether it improperly handled rebates in calculating Nachi's adjusted home price for comparison with COP for purposes of testing for sales made at prices below COP; and, (8) determine whether it improperly calculated foreign market value for FAG U.K. by erroneously adding U.S. repacking costs instead of home market packing costs.

Remand results are due within sixty (60) days of the date that this opinion is entered. Any comments or responses by the parties to the remand results are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date that responses or comments are due.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/130 12/23/94 DiCarlo, J.	Pharmacia LKB Biotechnology	92–05–00328	9027.20.40, 9027.90.40, 9027.50.40 4.9% 3914.00.00 3.9%	9027.20.42, 9027.90.42 3.9% retroactive to January 1, 1989 (56 Fed. Reg. 30303 (1991)) 3002.90.50 Duty free	Pharmacia LKB Biotechnology Inc. *v.* United States, Court No. 91–04–00260, Abs. No. C92/149 (August 14, 1992)	JFK, New York Electrophoresis instruments and Protein G used in cell biology

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